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No.

IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Revised Code of Washington 26.10.160(3) and the former RCW 26.09.240 granting third parties, including grandparents, the right to petition for visitation rights with a minor child if the visitation is "in the best interests of the child" impermissibly interfere with a parent's fundamental interest in the "care custody and companionship of a child" as defined by the liberty and privacy provisions of the United States Constitution?

2. Did the Supreme Court of Washington err in *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), in holding that RCW 26.10.160(3) and the former RCW 26.09.240 are unconstitutional based upon the liberty interest of the Fourteenth Amendment and the fundamental right to privacy inherent in the United States Constitution when it used the flawed premise that a parent's fundamental right to autonomy in child-rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness?

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Jenifer and Gary Troxel (the Troxels) petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The December 24, 1998 Opinion of the Supreme Court of Washington in Case No. 66207-0 attached at Appendix A, page 1a is reported at 137 Wn.2d 1, 969 P.2d 21 (1999). The Troxel Petition for Reconsideration was denied on April 6, 1999 in an Unpublished Order attached at Appendix E, page 81a. The July 28, 1997 Court of Appeals for Washington, Division One, in Case No. 36737-4-I is reported at 87 Wn. App. 131, 940 P.2d 698 (1997). Appendix B, page 55a. The January 3, 1996 Findings of Fact and Conclusions of Law of the Superior Court of Washington for Skagit County, Case No. 93-3-00650-7 is not reported and is attached at Appendix C, page 72a. The May 8, 1995 Visitation Decree of the Superior Court of Washington for Skagit County, Case No. 93-3-00650-7 is not reported and is attached as Appendix D, page 76a.

STATEMENT OF JURISDICTION

The Supreme Court of Washington held that RCW 26.10.160(3) and 26.09.240 (enacted prior to 1996) were unconstitutional pursuant to the "liberty interest" of the Fourteenth Amendment and the right of privacy inherent in the United States Constitution, thereby raising a federal question. (*See* App A, page 23a). On April 6, 1999, the Supreme Court of Washington entered an Order Denying Motion for Reconsideration, (*see* App D, page 76a), thereby terminating review in that court. The jurisdiction of this Court is thus invoked under 28 U.S.C. § 1257.

NOTIFICATION OF STATE ATTORNEY GENERAL

The Washington State Attorney General's Office acknowledges that RCW 26.10.160(3) and RCW 26.09.240 (enacted prior to 1996) were held to be unconstitutional.

STATUTES INVOLVED

Revised Code of Washington 26.10.160(3):

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Former Revised Code of Washington 26.09.240 (prior to 1996 amendments) provides:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

STATEMENT OF THE CASE

Natalie and Isabelle Troxel are the daughters of Brad Troxel and Tommie Granville, who never married. After their

separation, a Decree of Parentage and Parenting Plan was entered between Brad and Tommie regarding Natalie and Isabelle. Brad lived with his parents, Jenifer and Gary Troxel, and the girls regularly visited their father at their grandparents' home.

Brad committed suicide in May 1993. At first the girls continued to visit the Troxels regularly, but their mother soon decided to limit visitation. In December 1993, the Troxels filed a petition pursuant to RCW 26.10.160(3) to obtain visitation rights with their grandchildren. In 1995, the trial court entered a Visitation Decree ordering visitation one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. Granville appealed, during which time she married Kelly Wynn, who adopted the girls in February 1996.

Jenifer and Gary Troxel have been married 35 years. Jenifer is an accountant employed as the assistant finance director with the City of Anacortes. Gary is a Longshoreman in Anacortes. Gary was a member of the musical group, the Fleetwoods, while in high school in 1960. The group enjoyed national fame. Gary and the Troxel family continue their love of music. Gary performs with the group, the Fleetwoods, on the East Coast an average of eight times per year. Gary and Jenifer had four children, including their son, Brad. They have five grandchildren. They all live in Skagit County.

Jenifer and Gary Troxel had a close, stable and consistent relationship with Isabelle and Natalie from their births until October 1993, when Tommie restricted their access. In the nearly four years since the entry of temporary orders in April of 1994, Jenifer and Gary and Natalie and Isabelle maintained regular and consistent contact until the Court of Appeals Decision in July 1997.

Tommie Wynn, the children's mother, has six children of her own and two stepchildren. Jessie, Halie, and Roth Granville were born the issue of her relationship with Jeff Granville. Natalie and Isabelle were born of her relationship with Brad Troxel. Riley Wynn was born of her relationship with Kelly Wynn. Kelly Wynn has two children and Tommie is the stepmother of those children: Ryan and Kevin Wynn.

The Court of Appeals reversed the visitation order and dismissed the Troxels' petition for visitation holding that non-parents lack standing to seek visitation unless a custody action is pending. *In re Visitation of Troxel*[1]. The issue of impermissible interference with a parent's constitutionally protected interest in child rearing was raised in the Court of Appeals; however, the court did not reach this question since disposition was based upon lack of standing. (*See* App. B, Page 62a). The Troxels sought and were granted review by the Supreme Court of Washington. The Supreme Court of Washington in its decision *Custody of Smith*,[2] in which *In Re the Matter of Visitation of Troxel* was consolidated with two other cases, reversed the lack of standing holding of the Court of Appeals, but went on to hold RCW 26.10.160(3) and the former RCW 26.09.240 to be unconstitutional. (*See* App. A, page 23a).

1. 87 Wash. App. 131, 940 P.2d 698 (1997). (*see* App. B, page 55a).

2. 137 Wn.2d 1, 969 P.2d 21 (1998).

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL QUESTION.

The Supreme Court of Washington, a court of last resort, has decided an important federal question in a way that conflicts with the decisions of other state courts of last resort. The state court judgment is based upon a federal ground, namely the "liberty interest" of the Fourteenth Amendment and the right of privacy inherent in the United States Constitution. Nonfederal grounds are inadequate to support the state court judgment. The Supreme Court of Washington refrained from an analysis of state constitutional grounds because the Washington constitution affords no greater protection than the federal constitution in this area.[3] Therefore, a federal question was presented; the disposition of that question was necessary to the determination of the case; the federal question was actually decided and the judgment could not have been rendered without deciding it.[4] It is the responsibility of the United States Supreme Court to determine for itself the answer to the question of whether the state court judgment is based upon a nonfederal ground and whether a nonfederal ground is adequate to support the state court judgment.[5] The answer to both questions should be no.

3. *Smith*, 131 Wn.2d at page 34. (*see* App. A, page 41a).

4. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938).

5. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

II.

THE STATE COURTS DISAGREE.

Grandparent and third party visitation is a burgeoning area of the law. In 1985, the national survey of family law in the United States published each year in the Family Law Quarterly referred to the enactment of grandparent visitation statutes as a "recent phenomenon." By 1993 — just eight years later — every state in the United States had adopted a statute providing either specifically for grandparent visitation or generally for visitation rights of third parties over the objection of the parents.[6] Seventy-five percent (75%) of all older Americans are now grandparents.[7] Interest and demand for this issue grows with the growth of the older population.

State courts are divided on the standard of review which should be applied to third party/grandparent visitation statutes. The Supreme Court of Washington in *Custody of Smith*[8] has applied a strict scrutiny analysis to the application of Washington's third party visitation statutes which require a judicially determined finding that the visitation is in the "best

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6. Cynthia L. Greene, *Grandparents' Visitation Rights: Is the Tide Turning?*, Journal of the American Academy of Matrimonial Lawyers, Vol. 12, Page 51 (Summer 1994).

7. Jorge M. Cestero, *Happiness is Being a Grandparent? The Evolution of Grandparent Visitation in Florida*, The Florida Bar Journal/November 1997.

8. All references to the decision from which this review is taken will be made to *Custody of Smith* with the understanding that the action to which the Troxels are a party, namely, *Visitation of Troxel*, was consolidated by the Supreme Court of Washington with *Custody of Smith* and *Visitation of Wolcott*.

interests of the child". The court's decision relies on *Meyer v. Nebraska*, in which the United States Supreme Court recognized a constitutionally protected interest of parents to raise their children without state interference.[9] The court recognized this interest as being a fundamental "liberty" interest protected by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the United States Constitution.[10] Consequently, it held that where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interest is narrowly drawn to meet only the compelling state interest involved.[11] The court held that, based upon United States Supreme Court precedent, some harm must threaten the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her own child. The court held that the "best interests of the child" standard of the third party visitation statutes do not contemplate any harm or potential harm to the child which must be prevented by granting third party visitation rights. Accordingly, the parens patriae authority does not justify the interference with parental rights permitted by the statutes in question.[12]

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9. 262 U.S. 390, 399, 43 S. Ct. 628, 67 L. Ed. 1042 (1923). *Custody of Smith*, 131 Wn.2d at page 13, (App. A, page 12a).

10. *Custody of Smith*, 131 Wn.2d at page 15, (App. A, page 14a-15a).

11. *Custody of Smith*, 131 Wn.2d at page 15, citing *Roe v. Wade*, 410 U.S. 113, 115, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). (App. A, page 15a).

12. *Custody of Smith*, 131 Wn.2d at page 19. (App. A, page 20a).

The Washington Supreme Court joins other states in this analysis. It cited with approval *Hawk v. Hawk*[13] and *Brooks v. Parkerson*.[14] In these two cases, Tennessee and Georgia declared their grandparent visitation statutes violative of the United States Constitution.[15] *Hawk* was also decided on state constitutional grounds. Connecticut's statute, Conn. Gen. Stat. Ann. § 46B-59 (West 1986) has also been challenged.[16]

In contrast, Kentucky, Utah, New Hampshire and Indiana have applied a "best interests of the child" test. Kentucky's broadly written, open ended grandparent visitation statute[17]

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13. 855 S.W.2d 573, 580 (Tenn. 1993).

14. 454 S.E.2d 769 (Ga. 1995), *cert. denied*, 516 U.S. 942, 116 S. Ct. 337, 113 L. Ed. 2d 301 (1995).

15. *Brooks*, 454 S.E.2d at 776.

16. *Castagno v. Wholean*, 239 Conn. 336 (1996).

17. Ky. Rev. Stat. 405.021 Reasonable Visitation Rights To Grandparents.

> (1) The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so. Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.
>
> (2) The action shall be brought in Circuit Court in the county in which the child resides.

(Cont'd)

was at issue in *King v. King*.[18] In *King*, the United States Supreme Court denied a request to review a Kentucky Supreme Court decision that interpreted the Kentucky grandparent visitation statute, Ky. Rev. Stat. § 405.021 (Baldwin 1991), to allow a paternal grandfather to visit with his grandchild twice weekly against the wishes of the child's married, fit and natural parents. It is asserted that the United States Supreme Court's decision not to hear *King* and thus to allow the Kentucky Statute to stand as constitutional is an indication that the United States Supreme Court will not agree with the analysis used in *Hawk*, *Brooks* and *Smith*. Washington's third party visitation statute is an open-ended statute similar to Kentucky's grandparent visitation statute, except that Washington's statute permits "any person" "at any time" to petition for visitation rights when visitation may serve the "best interest of the child" RCW 26.10.160(3).

The dissent in *Smith*[19] stated that reliance on *Wisconsin v. Yoder*[20] is misplaced because *Yoder* turned on the free exercise

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(Cont'd)

> (3) The Circuit Court may grant noncustodial parental visitation rights to the grandparent of a child if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent, unless the court determines that the visitation is not in the best interest of the child. If visitation is not granted, the grandparent shall not be responsible for child support.

18. 828 S.W.2d 630 (Ky. 1992), *cert. denied*, 113 S. Ct. 378 (1992).

19. *Custody of Smith*, 131 Wn.2d at page 31, (App. A, page 35a-36a).

20. 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

claim asserted by the Amish parents and the unique facts of that case. Justice Talmadge wrote in his dissent that the United States Supreme Court did not hold that harm is a threshold requirement for any encroachment upon parental rights as the majority in *Smith* implied; but rather notes even where the circumstances of a particular case provide heightened protections for parental rights, the extreme circumstances of harm to the child clearly justifies state intervention. *Yoder* held the the state may intervene when the parent threatens harm to a child. *Yoder* did not hold that the state must prove a threat of harm to a child before it could intervene.[21] In grandparent and third party visitation cases, the grandparent or the third party initiates the intervention. Initiation is taken by persons in relationship with and acting in the best interests of the minor child. The state does not initiate these actions as they did in *Yoder* and *Prince*.[22] No definite boundary has been drawn. This issue has not been squarely before this Court. The boundary line should be drawn under the facts of this case.

Other states have also upheld the constitutionality of grandparent visitation statutes. In *Campbell v. Campbell*,[23] the Utah Court of Appeals noted that the majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld those statutes as constitutional.[24] The Indiana Court of Appeals upheld Indiana's grandparent visitation act against a federal constitutional challenge. The court held that

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21. 406 U.S. 205 at pages 233-34.

22. 321 U.S. 158 at pages 170-71 (1944).

23. 869 P.2d 635 (Utah App. 1995).

24. *Campbell*, 869 P.2d at page 644, note 18.

visitation rights by grandparents are less than a substantial encroachment on the parent's fundamental rights and the Act is therefore a legitimate exercise of the state's parens patriae power.[25] New Hampshire recognized in *Roberts v. Ward* [26] that even absent specific statutory authority a court may exercise its parens patriae power to act in a child's best interest regarding visitation matters.

Justice Talmadge noted in his dissent in *Smith* that the "best interest of the child" standard is sufficient because the factors for consideration required in the trial court's exercise of judicial discretion are clearly subsumed under the "best interest of the child" determination.[27] The "best interest of the child" standard depends on a highly fact specific inquiry that cannot be reduced to a mathematical formula. To do so would be violative of the child's uniqueness in person and in its circumstances and relationships.

Where the states are divided regarding the constitutionality of grandparent visitation statutes, the issue is ripe for review.

III.

ADDRESSING THE WELFARE OF OUR CHILDREN AND PRESERVING THE FAMILY IN THE FUTURE.

The majority in *Smith* has idealized the "basic family unit". A conservative judiciary has defined the traditional concept

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25. *Sightes v. Barker*, 684 N.E.2d 224 (Ind. App. 1997), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997).

26. 126 N.H. 388, 493 A.2d 478 (1995).

27. *Custody of Smith*, 131 Wn.2d at page 37-38 (App. A, page 46a).

of a family as a heterosexual man and woman who bear and raise children inside the legal institution of marriage. The "nuclear family" or "basic family unit" is really only a recent phenomenon of modern civilization. The family, over eons, has consisted of multi-generations living together in one home or community. Inter-generational families have been the norm for a longer period of time than the modern "nuclear family" has existed. The Kentucky Supreme Court in *King* states that the intent of its statute is to preserve the family by strengthening family bonds.[28]

Does the "nuclear family" truly represent the "core element of civilization" as *Smith* asserts.[29] Maybe during the past 70 years it has, but this definition would not be accurate for the period of time prior to the industrial revolution and may not be true for the evolving family of the future.

The fact is, there has been a dramatic erosion of the "stable basic family unit". The erosion of the modern "nuclear family" is a result of multiple marriages and divorces, the increased bearing of children outside of marriage, long-term cohabitation relationships among couples with alternative sexual preferences, geographical separation from extended family members, the changing social economic role of women, and the new reproduction technologies.[30] New reproductive technology and genetic paternity testing has made multiple mothers and fathers possible for a child under traditional

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28. *King*, 828 S.W.2d at 632.

29. *Custody of Smith*, 131 Wn.2d page at 13-15, (App. A, page 14a).

30. *See* Shapiro, "*Non-Traditional Families in the Courts: The New Extended Family*," The Journal of the American Academy of Matrimonial Lawyers, Volume II, Winter 1993).

biological or legal definitions.[31] It has been said that there are now 16 different reproductive combinations in addition to traditional conception in childbirth.[32]

Are the courts and our society equipped to deal with modern life using the traditional view of the family? The conservative judicial view of the "basic stable family unit" as expressed in *Smith* may even be unintentionally racial or socioeconomically based. The states' courts and legislatures are grappling with elemental definitions in an area of dynamic change which touches the lives of every citizen of our country.

IV.

EFFECTS OF ADOPTION ON THE RIGHT TO VISITATION.

A review of *Custody of Smith* will also necessarily involve addressing the issue of whether a step-parent adoption terminates the rights of grandparents. In *Visitation of Troxel*, after their marriage, Granville's husband, Kelly Wynn, adopted Natalie and Isabelle in their attempt to cut off any visitation rights by the Troxels under the fresh start policy of RCW 26.26.[33] If this Court rules in favor of the Troxels, upholding

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31. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

32. *See* John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 355 (1991) cited by Shapiro, *"Non-Traditional Families in the Courts: The New Extended Family"*, The Journal of the American Academy of Matrimonial Lawyers, Volume II, Winter 1993) at page 121.

33. *Custody of Smith*, 131 Wn.2d. at page 6, (App. A, page 3a).

the constitutionality of visitation statutes, then the issue of infringement upon an adoptive step-parent's rights will have to be addressed.[34] Indiana held that permitting grandparent visitation over an adoptive parent's objection does not constitutionally impinge on the integrity of the adoptive family.[35]

V.

JUDICIAL DISCRETION.

The issue is whether or not the open ended statutes of Washington and Kentucky and their reliance upon application of the "best interest of the child" standard and reliance upon judicial discretion is sufficient. In the case of *Adoption of Hugo*,[36] currently on petition to the United States Supreme Court for writ of certiorari, also addresses this issue, but from a different direction.

The Supreme Judicial Court of Massachusetts stated:

> The "best interest of a child" is a question that presents the trial judge "with a classic example of a discretionary decision".[37]

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34. *See Custody of B.S.Z.-S.*, 74 Wn. App. 727, 875 P.2d 693 (1994) and *In re Marriage of Aragon*, 764 P.2d 419, Colo. Ct. App. (1988). *H.F. v. T.F.*, 483 N.W.2d 803, 804-806 (Wisc.), *cert. denied*, 113 S. Ct. 408 (1992).

35. *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. Ct. App.), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997).

36. 428 Mass. 219, 700 N.E.2d 516 (1998).

37. 428 Mass. at page 225.

The Supreme Judicial Court of Massachusetts decided not to adopt a general presumption in favor of maintaining a sibling relationship in child custody cases, instead deciding to rely upon judicial discretion based upon the "best interests of the child". A case by case application of "the best interests of the child" standard can insure the welfare of each child in light of the circumstances of each "family".

VI.

WHAT DOES THE FUTURE HOLD?

Crucial in this area of law is that each child be considered as a unique human being and that a child's unique circumstances be considered on a fact specific or case by case basis. Preservation of a parent's fundamental rights is a laudable goal; however, the welfare of children who may be cut off or isolated from loving contact with a significant parenting figure in their lives is of a higher importance. Recent events indicate that it may be time to pay more attention to our children's state of mind than a parent's rights. The right of privacy emanating from *Griswold* came from the concept of a penumbra of rights giving rise to the right of privacy.[38] The issue before this Court is whether there is also an equal penumbra of responsibilities by parents to sustain loving and nurturing relationships between their children and third parties, in spite of difficulties between adult family members and particularly in honor of deceased parents and their familial ties.

Present variation among statutes throughout the United States and the lack of guidance from Congress or this Supreme Court has created difficulties for both parents and grandparents

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38. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

in determining their respective roles in the lives of their children. These inconsistencies and ambiguities have created particular hardships for the children caught in a family tug-o-war. Although the courtroom is not the ideal forum to resolve family disputes, it has become the last resort for the settlement of grandparent visitation disputes.[39] Congress has considered grandparent rights legislation.[40] Article 1, Section 8 of the Constitution enumerates the areas in which Congress may legislate and family matters and grandparent visitation do not fall within any of congress' enumerated powers under the Tenth Amendment.[41]

VII.

WHAT REVIEW WILL PROVIDE.

Because of the breadth of the Washington Statutes, this Court will be able to provide significant guidance to the fifty states. Any decision by this Court will have far reaching effects. Review of the constitutionality of RCW 26.10.160(3) will provide the United States Supreme Court with the broadest opportunity to look at this complex and emotional family issue that it may ever have in reviewing the grandparent/third party visitation issue. RCW 26.10.160(3) granted rights to petition for visitation in the following and other situations:

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39. Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 American University Law Review, 563, 587-588 (1994).

40. *Id.* at 587-588. (Ms. Jackson reviews in her article excerpts of House Hearings regarding grandparent visitation).

41. U.S. Const. amend. X. "The powers not delegated to the United Sates by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

1. *Grandparents.* Where grandparents have provided nurturing care for children and have maintained close family ties in situations where the parents were unable to provide care for their children or in some way fostered close connections; or where there has been a tragic death of a parent and the continuation of inter-generational ties are sought.

2. *Step-parents.* In situations where a child born out of wedlock, whose father "disappears" and whose mother remarries and has more children of that marriage and whose step-father is the only "father" the child has ever known; who loves and is close to his/her siblings and then when the child's mother dies of disease or accident and the biological father appears on the doorstep to claim his child, the former "step-father" now has no right to visit his "oldest child" and the child has no right to see his siblings?

3. *Biological vs. Presumptive Fathers.*

4. *Surrogate/biological Mothers vs. Legal Mothers.*

5. *Parental Figures in Same Sex Relationships.*

The European Convention's approach to grandparent visitation seeks to preserve family relationship. It replaced the term *parental authority* with the term *parental responsibility* in the European Convention on the Exercise of Children's Rights 1995.[42] The Wiertz-Wezenbeek article suggests that *parental authority* should be replaced with *parental responsibility* in recognition that children's views and wishes should be taken into account.

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42. Wiertz-Wezenbeek, *Visitation Rights of Nonparents and Children in England and the Netherlands*, Family Law Quarterly, volume 31, Number 2, 1997.

In France, grandparents do have visitation rights with their grandchildren and do not have to demonstrate the existence of a family life. Visitation is denied whenever the parents show that the visitation is not in the child's best interests.[43]

The Convention and the rulings of the Commission are referred to because their approach introduces the perspective of family life in a broader sense. While the result may seem at odds with the majority's decision in *Smith*, its goal may be similar. If the protection of the "core element" of our civilization, the family is paramount, then ought not grandparents who can demonstrate a *close family relationship* with their grandchildren be able to maintain that contact if it is in the "best interests of the child?" Don't parents who have participated or even created and tested these relationships have a responsibility to maintain this contact? Aren't families in this approach being preserved?

Margaret Mead, the noted anthropologist, stated in 1978:

> Nobody has ever before asked the nuclear family to live all by itself in a box the way we do, with no relatives, no support. We've put [the family] in an impossible situation.

The question becomes whether the Fourteenth Amendment and the right of privacy is protecting the "nuclear family" or isolating it.

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43. Wiertz-Wezenbeek, *Visitation Rights*, *supra* at page 360.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF WASHINGTON DATED AND DECIDED DECEMBER 24, 1998 IN *CUSTODY OF SMITH*, 137 Wn. 2d 1

[Nos. 65605-3; 65699-1; 66207-0. En Banc.]
Argued March 11, 1998. Decided December 24, 1998.

In the Matter of the Custody of SARA SKYANNE SMITH.

EDISON SMITH, ET AL., *Respondents*, v. KELLY STILLWELL-SMITH, *Appellant*.

In the Matter of the Visitation of JUSTIN ROSS WOLCOTT, DAVID L. CLAY, *Petitioner*, and LISA WOLCOTT, *Respondent*.

In the Matter of the Visitation of NATALIE ANNE TROXEL, ET AL, JENIFER TROXEL, ET AL., *Petitioners*, and TOMMIE GRANVILLE, *Respondent*.

• • •

MADSEN, J. — The issues presented in these three consolidated cases are whether petitioners had standing to petition for visitation under either RCW 26.10.160(3) or former RCW 26.09.240 and whether these statutes violate the parents' constitutionally protected interest in raising their children without state interference. We conclude petitioners have standing but, as written, the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm.

Appendix A

STATEMENT OF THE CASE

Wolcott. Justin Wolcott was born April 10, 1986. After Justin was born, Justin's mother, Lisa, began a relationship with David Clay. The three lived together from May 1988 until 1992. After Wolcott and Clay separated, Clay continued to see Justin. However, relations between Wolcott and Clay deteriorated and, in November, Clay petitioned pursuant to RCW 26.10.160(3) to establish visitation rights with Justin. A court commissioner entered a temporary order allowing visitation every other weekend. On motion for revision, Judge Wilson reduced visitation to one Saturday per month. Wolcott appealed that order to Division One, arguing that Clay lacked standing to seek visitation. Commissioner Ellis dismissed the appeal because no final appealable order had been entered. He also found no obvious or probable error and denied discretionary review.

Following a trial in October 1995, Judge Hansen dismissed Clay's petition for visitation holding that Clay lacked standing to seek visitation because he is not related to Justin and no custody action was pending. The court awarded Wolcott her attorneys fees. The Court of Appeals affirmed and awarded Wolcott additional attorneys fees for the appeal. *In re Visitation of Wolcott*, No. 37883-0-I, slip op. at 11 (Wash. Ct. App. Mar. 24, 1997). Clay sought and was granted review by this court.

Troxel. Natalie and Isabelle Troxel are the daughters of Brad Troxel and Tommie Granville, who never married. After their separation, Brad lived with his parents, Jenifer and Gary Troxel, and the girls visited their father at their

Appendix A

grandparents' home on occasion. Brad committed suicide in May 1993. At first the girls continued to visit the Troxels regularly, but their mother soon decided to limit visitation. In December 1993, the Troxels filed a petition pursuant to RCW 26.10.160(3) and former RCW 26.09.240 to obtain visitation rights with their grandchildren. In 1995, the trial court entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. Granville appealed, during which time she married Kelly Wynn, who adopted the girls in February 1996. The Court of Appeals remanded for entry of findings of fact and conclusions of law, which were entered in January 1996.

The Court of Appeals subsequently reversed the visitation order and dismissed the Troxels' petition for visitation holding that nonparents lack standing to seek visitation unless a custody action is pending. *In re Visitation of Troxel*, 87 Wn. App. 131, 940 P.2d 698 (1997). The Troxels sought and were granted review by this court.

Smith. Brian Smith and Kelly Stillwell were married in 1989. In 1992, Stillwell gave birth to daughter, Sara, conceived through artificial insemination (Brian was not the donor). In 1995, Stillwell petitioned for dissolution of the couple's marriage. Both parties sought custody of Sara. On February 25, 1996, Stillwell's mother went to Brian's home and shot him. Brian fired back, and they were both killed. A dispute then developed between Stillwell and Brian's surviving family members (his parents, brother, and sister) regarding when and to what extent Sara should have contact with them. Consequently, the Smith family

petitioned for visitation rights with Sara. Following a trial held in April 1997, the trial court granted the petition, under former RCW 26.09.240, and established a visitation schedule. Stillwell appealed the order to Division One of the Court of Appeals. The court granted the Smiths' motion to transfer the appeal to this court. All three cases were consolidated for review.

DISCUSSION

The parties in this case sought visitation rights pursuant to RCW 26.10.160(3) and former RCW 26.09.240, both of which address visitation rights of nonparents. RCW 26.10.160(3) provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Former RCW 26.09.240 (prior to 1996 amendments) provides:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.
>
> A person other than a parent may petition the court for visitation rights at any time.

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

The question before this court is whether a nonparent petitioner has standing pursuant to RCW 26.10.160(3) or former RCW 26.09.240 to petition for visitation with a child outside the context of custody or dissolution proceedings. Even if the nonparent petitioners do have standing to sue, appellant, Kelly Stillwell, argues that the statutes impermissibly violate a parent's fundamental right to autonomy in child-rearing matters.

STANDING

At issue in each of these cases is whether RCW 26.10.160(3) and former RCW 26.09.240 permit a nonparent to seek visitation in the absence of a custody proceeding. The parents argue that the question should be answered in the negative and ask this court to find that the individuals who petitioned for visitation rights lack standing under the applicable statutes. The petitioners respond stating that the plain meaning of RCW 26.10.160(3) and former RCW 26.09.240 allow them to petition for visitation absent a custody proceeding noting that both statutes allow "any person" to petition for visitation at "any time." We hold that the plain language of the statutes gives Clay and the Troxels standing to petition for visitation rights under RCW 26.10.160(3) and the Smiths standing to petition for visitation under former RCW 26.09.240.

In answering the question before this court we must interpret the meaning of RCW 26.10.160(3) and former

RCW 26.09.240. We review questions of statutory construction de novo. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993). The purpose of statutory interpretation is to determine and give effect to legislative intent. *Duke v. Boyd*, 133 Wn.2d 80, 87-88, 942 P.2d 351 (1997). Legislative intent is primarily determined from the statutory language. *Id.*

> When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written. Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the court question the wisdom of a statute even though its results seem unduly harsh.

Id. at 87 (citations omitted). This court has emphasized that it will not construe unambiguous language and that it "assume[s] that the legislature means exactly what it says." *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991)).

Both RCW 26.10.160 and RCW 26.09.240 address the rights of nonparents to seek visitation with a child. Both statutes have been amended several times, most recently in 1996. As originally enacted in 1973, as part of a chapter having mainly to do with parenting plans in dissolution actions, former RCW 26.09.240 provided that a parent not granted custody of a child is entitled to reasonable visitation rights unless visitation would endanger the child's health.

It also said, "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child." Laws of 1973, 1st Ex. Sess., ch. 157, § 24. In 1976, the Court of Appeals held the phrase "any person" did not authorize trial courts to grant visitation rights to "third person," including grandparents, absent a change of circumstances, such as death of one or both parents or termination of the nuclear family unit. *Carlson v. Carlson*, 16 Wn. App. 595, 597, 558 P.2d 836 (1976).

The following year, the Legislature amended RCW 26.09.240 to read: "The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change in circumstances. Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings." Laws of 1977, 1st Ex. Sess., ch. 271, § 1. The statute retained its original language regarding visitation rights of parents denied custody.

In 1987, the Legislature adopted an extensive bill regarding parenting, child custody and child support. Laws of 1987, ch. 460. One section of that bill amended RCW 26.09.240 to omit references to visitation rights of parents denied custody and also to delete the phrase "including, but not limited to, custody proceedings." Laws of 1987, ch. 460, § 18. Thus, as amended, RCW 26.09.240 read, "The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances. Any person may petition the court for visitation rights at any time." *Id.*

In another section of this bill, the Legislature created a new statute which overlapped both the old and new versions of RCW 26.09.240. This new statute gave presumptive visitation rights to parents denied custody and allowed trial courts to order visitation rights "for any person" to petition for such rights "any time including, but not limited to, custody proceedings." LAWS OF 1987, ch. 460, § 44. Although this statute dealt with visitation rights of both parents and nonparents, it was codified as RCW 26.10.160, in a new chapter titled "Nonparental Actions for Child Custody." LAWS OF 1987, ch. 460, § 25.

In 1989, the Legislature amended RCW 26.10.160 to clarify the circumstances under which a parent who is denied custody may be allowed visitation. LAWS OF 1989, ch. 326, § 2(1), (2). That amendment also divided the statute into four subsections, and placed the language regarding nonparent visitation rights in subsection (3). LAWS OF 1989, ch. 326, § 2(3). This subsection still permitted "any person" to seek visitation "at any time" including, but not limited to custody proceedings "whether or not there has been any change of circumstances." LAWS OF 1989, ch. 326, § 2(3). That same session, the Legislature also amended RCW 26.09.240 to permit "a person other than a parent" (rather than "any person") to petition for visitation. LAWS OF 1989, ch. 375, § 13.

In 1994, the Legislature amended RCW 26.10.160 to further clarify the circumstances under which parents denied custody may be allowed (or denied) visitation. LAWS OF 1994, ch. 267, § 2. The Legislature made no changes to the subsection of the statute allowing "any person" to petition

for visitation "at any time including, but not limited to, custody proceedings." LAWS OF 1994, ch. 267, § 2(3).

In 1996, the Legislature again amended both RCW 26.09.240 and RCW 26.10.160. RCW 26.09.240 now requires any nonparent seeking visitation to show that he or she has a significant relationship with the child. It also states that a "person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter," which includes an action for dissolution of marriage, legal separation or modification of a parenting plan proceeding. LAWS OF 1996, ch. 177, § 1(1). As amended, RCW 26.09.240(6) also contains a list of factors for the trial court to take into consideration when making a determination of the child's best interests. Some of these factors are the strength of the relationship between the child and the petitioner, the relationship between the child's parents and the petitioner, the nature and reason for the parent's objection to visitation, and any criminal history or history of physical, emotional or sexual abuse or neglect by the petitioner. Additionally, the restrictions that apply under RCW 26.09.191 to parents also apply to a petitioner or intervenor who is not a parent. RCW 26.09.240(7).

The 1996 Legislature amended RCW 26.10.160 again to clarify the visitation rights of parents denied custody. LAWS OF 1996, ch. 303, § 2(1)-(2). The Legislature made no changes to subsection (3) of this statute, dealing with petitions for visitation by "any person" "at any time including, but not limited to, custody proceedings. . . .

whether or not there has been any change of circumstances." LAWS OF 1996, ch. 303, § 2(3). There is no language limiting actions under RCW 26.10.160(3) in the manner they are limited under RCW 26.09.240.

Although the plain language of RCW 26.10.160(3) allows "any person" to petition for visitation "at any time," the Court of Appeals in *Wolcott* and *Troxel* relied on the 1996 changes in comparable language in RCW 26.09.240 as a basis for avoiding the plain language of the statute. *Wolcott*, 85 Wn. App. at 473; *Troxel*, 87 Wn. App. at 136. The court in *Wolcott* stated it could not "conceive of any reason why the Legislature did not similarly amend RCW 26.10.160(3), a virtually identical provision in the parallel statute." *Wolcott*, 85 Wn. App. at 473. The court, therefore, found that the Legislature unintentionally overlooked amending RCW 26.10.160(3). To correct that perceived oversight, the court deleted the provision of RCW 26.10.160(3) allowing "any person" to petition for custody at "any time including, but not limited to, custody proceedings" and replaced it with the 1996 amendment to RCW 26.09.240 prohibiting nonparents from bringing a visitation action "unless the child's parent or parents have commenced an action under this chapter." RCW 26.09.240(1). As interpreted by the Court of Appeals, both sections would prohibit nonparent visitation action under either chapter unless a custody proceeding is pending.

Our concern with the Court of Appeals analysis is its reluctance to address the plain language of RCW 26.10.160(3). Although the Legislature amended RCW 26.09.240 and other sections of RCW 26.10.160, it left

RCW 26.10.160(3) untouched. By its plain language, RCW 26.10.160(3) gives nonparents an avenue to obtain visitation rights with children outside of a custody proceeding. We decline to construe the language of RCW 26.10.160(3) because we find that the language of the statute is unambiguous. Further, we will not read qualifications into the statute which are not there. A "court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission." *Automobile Drivers & Demonstrators Union Local 882 v. Department of Retirement Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979) (citing *Jepson v. Department of Labor & Indus.*, 89 Wn.2d 394, 573 P.2d 10 (1977)); *accord State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982); *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981). Thus, the petitioners in *Wolcott* and *Troxel* had standing to petition for visitation under RCW 26.10.160(3).

In *Smith*, application of former RCW 26.09.240 yields the same result. Appellant, Kelly Stillwell, asserts the trial court had no authority to order visitation with her daughter by third parties (the Smiths) outside of an action for custody or allegation she is an unfit mother.

However, when the Smiths filed their petition for visitation, RCW 26.09.240 did not require the existence of a pending action under RCW 26.09 as a precondition to a nonparents visitation petition. Former RCW 26.09.240 allowed "[a] person other than a parent" to "petition the court for visitation [rights] at any time." Thus, under the plain language of the statute, the Smiths could petition the

court for visitation rights "at any time," as the trial court properly held.[1]

CONSTITUTIONALITY OF RCW 26.10.160(3) AND FORMER RCW 26.09.240

In *Wolcott* and *Troxel*, the Court of Appeals rewrite of RCW 26.10.160(3) is based on its concern that a literal reading of the statute would have the "intolerable" consequence of "stable families" being "forced to defend in court against visitation petitions having no basis." *In re Visitation of Wolcott*, 85 Wn. App. 468, 472, 933 P.2d 1066 (1997); *see also In re Visitation of Troxel*, 87 Wn. App. 131. While the statute as written may have potentially troubling consequences for stable families, this does not justify Court of Appeals rewriting of the statute.

Nevertheless, it is undisputed that parents have a fundamental right to autonomy in child rearing decisions. The United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference. *See Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923) (The liberty interest guaranteed by the Fourteenth Amendment includes freedom "to engage in any of the common occupations of life, to acquire useful

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1. The trial court found that the petition for visitation was governed by the version of RCW 26.09.240 that was in effect when their action was filed on April 3, 1996. The court held that the language added to the statute by the 1996 amendment was not applicable since the amendment was not effective until June 6, 1996.

knowledge, to marry, establish a home and bring up children . . . ."); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468 (1925) (law prohibiting parents from sending children to private as opposed to public school unconstitutional because it would "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of [their] children . . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (Court recognized that "the custody, care and nurture of the child reside first in the parents. . . . it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter."); *Wisconsin v. Yoder*, 406 U.S. 205, 235-36, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (exempting Amish from the state compulsory education law requiring children to attend school beyond the eighth grade); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (in determining the standard of proof necessary in termination of parental rights case, the Court noted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.")

The Supreme Court defined the nature of this constitutionally protected interest in *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), when it held unconstitutional an Illinois law which declared that, upon the death of the mother, children of unwed fathers become wards of the state:

> The private interest here, that of a man in the children he has sired and raised, undeniably

warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man' . . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment . . . .

(Citations omitted.)

The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a societal institution. A parent's constitutionally protected right to rear his or her children without state interference, has been

recognized as a fundamental "liberty" interest protected by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the constitution. Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved. *See Roe v. Wade*, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

In answering whether the state visitation statutes at issue serve a compelling state interest we must understand the sources of state power to intrude on family life. The state may act pursuant to its authority to protect citizens from injuries inflicted by third persons or to protect its citizens from threats to health and safety. Thus, in the context of family life, the state's police power gives it the authority to require the vaccination of children against communicable diseases over the objection of their fit parents. *See Prince*, 321 U.S. at 166-67. Similarly, the state may step in and override a decision of a parent where the decision would harm the child. *In Prince v. Massachusetts*, for example, the Supreme Court refused to invalidate legislation which prohibited a parent from permitting a minor to sell merchandise on a public street. *Prince*, 321 U.S. 158. Although the Court acknowledged the parent's constitutionally protected right to child-rearing autonomy, it found a narrow exception necessary in light of the "crippling effects of child employment," "more especially in public places." *Id.* at 168. Police power thus empowered

the state to intrude on a parental decision in the interests of society as a whole where the decision directly and severely imperiled the child.

The state's other source of authority to intrude on a family's autonomy is its parens patriae power. As parens patriae the state acts from the viewpoint and in the interests of the child. Like the state's police power the state may act only pursuant to its parens patriae power where a child has been harmed or where there is a threat of harm to a child. *See Yoder*, 406 U.S. at 206. Both parens patriae power and police power provide the state with the authority to act to protect children lacking the guidance and protection of fit parents of their own, and although they may represent different perspectives, both contemplate harm to the child and, in practical terms, have been used nearly interchangeably in the fashioning of a threshold requirement of parental unfitness, harm, or threatened harm. *See* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996).

For example, in *Yoder*, the Supreme Court held that the First and Fourteenth Amendments prevented the state from compelling Amish parents to send their children to public school after completion of the eight grade. *Yoder*, 406 U.S. at 205. The state argued, based on the Court's prior decision in *Prince*, that such a decision fails to give due regard to the power of the state as parens patriae to extend the benefit of the secondary education to children regardless of the wishes of their parents. *Yoder*, 406 U.S. at

229. The Court explained that in *Prince*, the Legislature was within its authority to curtail the evils associated with child labor. *Id.* at 230. But unlike *Prince*, the case presented in *Yoder* was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.*

These parties who have petitioned for visitation rights argue that former RCW 26.09.240 and RCW 26.10.160(3) serve a compelling state interest that warrants use of the state's parens patriae power to impose visitation with third persons where the visitation serves the "best interest of the child." Petitioners contend that a judicially determined finding that visitation is in the best interests of the child is a sufficiently compelling justification to override a parent's opposition, regardless of the fact that the parent's fitness is not challenged or that there has been no showing of harm or threatened harm to the child.

However, the Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Yoder*, 406 U.S. at 234. In *Yoder*, for example, the Court deemed significant the fact that Amish children would not be harmed by receiving an Amish education rather than a public education. *Yoder*, 406 U.S. at 230. Likewise, in *Pierce*, the Court found that parents' decisions to send their children to private schools were "not

inherently harmful," as there was "nothing in the . . . records to indicate that [the private schools] have failed to discharge their obligations to patrons, students, or the state." *Pierce*, 268 U.S. at 534. In *Meyer*, a case in which a teacher had been convicted of teaching a child German, the Court found that "proficiency in a foreign language . . . is not injurious to the health, morals or understanding of the ordinary child," and thus the state's desire "to foster a homogeneous people with American ideals" was insufficient justification for forbidding foreign language instruction. *Meyer*, 262 U.S. at 402-03. In *Stanley*, the Court required an individualized finding of parental neglect before stripping an unwed father of his parental rights. 405 U.S. at 645. On the other hand, the Court upheld the conviction of the mother who allowed her child to sell magazines, approving state interference designed to prevent "psychological or physical injury" to the child. *Prince*, 321 U.S. at 170. It is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child.

Washington has followed suit, allowing state interference with parents' rights to raise their children only where the state seeks to prevent harm or a risk of harm to the child. This court has emphasized that a state can only intrude upon a family's integrity pursuant to its parens patriae right when "parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Welfare of Sumey*, 94 Wn.2d at 762 (citing *Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); *Yoder*, 406 U.S. at 230).

In *Sumey*, parents were temporarily denied custody of their child pursuant to former RCW 13.32,[2] which allowed for the temporary alternative placement of a child outside the parents' home. *Sumey*, 94 Wn.2d at 758-59. Under former RCW 13.30.020, *repealed by* LAWS OF 1979, ch. 155, § 86, a child could be placed into limited custody where the child had been reported as a runaway or when a law enforcement officer believed the child was in circumstances which constituted imminent and substantial danger to the child's physical safety. The state could then, at the request of the child or the parents, place the child in a temporary[3] alternative residential placement if the court found by a preponderance of the evidence that the petition was not capricious and that there was "a conflict between the parent and child that cannot be remedied by counseling, crisis intervention, or continued placement in the parental home." *Id.* at 764 (quoting former RCW 13.32.040, *repealed by* LAWS OF 1979, ch.155, § 86).

In *Sumey*, we concluded that the state properly acted pursuant to its parens patriae power finding that former RCW 13.32 was enacted to "safeguard the mental and emotional health of the child by removing him or her from

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2. Provisions in former RCW 13.32 have been supplanted by provisions in RCW 13.32A.

3. The residential placement was temporary. A review hearing had to be held every six months to approve or disapprove of the continuation of the placement. RCW 13.32.050, *repealed by* LAWS OF 1979, ch. 155, § 86. Throughout the six month period appropriate interim services were provided to the child and parents with the ultimate goal of reunification. *Id.*

a situation of family conflict that is so extreme that the parents and child are unable to live together even with the aid of counseling." *Id.* at 764. Additionally, the court emphasized that the statute also protected the "physical health of children like [Sumey] . . . who [were] driven by the family conflict to run away from home and expose themselves to the physical dangers that attend running away." *Id.* at 764-65.[4]

In contrast, this case presents no such compelling interest of the state. The statutes at issue do not contemplate any similar harm or potential harm to the child which must be prevented by third party visitation rights. Accordingly, the parens patriae authority does not justify the interference with parental rights permitted by these statutes.

One court aptly emphasized that "[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process." *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993).

> For the state to delegate to the parents the authority to raise the child as the parents see fit,

4. We note that the court in *Sumey* did not engage in a strict scrutiny analysis although it recognized that a parent's fundamental right to the "care, custody, and companionship" was at stake. *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). The court instead, without citation to authority, engaged in a balancing analysis weighing the interests of the parents against the parens patriae power of the state. *Id.* at 763. Nevertheless, the court's result was correct because the interests of the state in that case, as discussed above, were compelling and the statute was narrowly tailored to serve the state's interest.

> except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also' does not constitute a delegation of authority.

Id. (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 441 (1985-86)).

We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. The difficulty, however, is that such a standard is not required in RCW 26.10.160(3) or in former RCW 26.09.240. Both statutes allow "any person" to petition for forced visitation of a child at "any time" with the only requirement being that the visitation serve the best interest of the child. There is no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation.

Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state

to make significant decisions concerning the custody of children merely because it could make a "better" decision.

Additionally, the statutes lack other safeguards to prevent stable families from defending in court against frivolous petitions for visitation. Most notably the statutes do not require the petitioner to establish that he or she has a substantial relationship with the child. It seems that at a minimum such a showing should be required because harm to a child cannot reasonably be anticipated as a result of no contact with someone with whom the child has had no such relationship. Also, the statutes do not require the court to take into consideration such factors as the parents' reasons for restricting visitation with the petitioner or any allegations of past physical or mental abuse by petitioner when making a visitation determination.

Parents have a right to limit visitation of their children with third persons. The law's concept of the family rests "on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment . . . ." *Brooks v. Parkerson*, 265 Ga. 189, 192, 454 S.E.2d 769 (1995). Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas. *See* Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393

(1985-86). RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of the child." *Sumey*, 94 Wn.2d at 762.

ATTORNEYS FEES

Both RCW 26.09.140 and RCW 26.10.080 allow either party, based on financial need to recover attorneys' fees and costs from another party as a result of maintaining or defending any proceeding under either chapter upon a showing of financial need. Additionally upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. RCW 26.09.140; RCW 26.10.080. In deciding whether to award fees and costs, the court must balance the needs of the party requesting fees against the other parties' ability to pay. *In re Marriage of Harrington*, 85 Wn. App. 613, 935 P.2d 1357 (1997).

In *In re Custody of Smith*, the trial court declined to award either party costs or reasonable attorneys fees pursuant to RCW 26.09.140 and RCW 26.10.080. On appeal, Kelly Stillwell asserts the trial court erred its decision denying attorneys fees and costs. She also asks for attorneys fees and costs incurred on appeal.[5] Ms.

5. Ms. Stillwell asks for attorneys fees and costs on appeal pursuant to RCW 26.09.240(3). Ms. Stillwell cannot receive attorneys fees pursuant to RCW 26.09.240(3) as it was not in effect at the time the petition for custody was filed and there is not indication that the Legislature intended the amended provisions of the statute to be applied retroactively.

Stillwell, however, has not shown that the trial court abused its discretion in its determination. *See In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994) (the party challenging the award bears the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable). Pursuant to RAP 18.1(c) Ms. Stillwell has filed an affidavit of financial need to this court in support of her request for an award of fees and costs on appeal.

Likewise, neither the Troxels nor Ms. Granville were awarded fees or costs below. Ms. Granville asks this court pursuant to RCW 26.09.140 and RCW 26.10.080 to award her attorneys fees and costs on appeal. She has filed an affidavit reflected her financial need as required by RAP 18.1(c).

Finally, Ms. Wolcott was awarded attorneys fees by both the trial court and on appeal pursuant to RCW 26.10.080. Clay asks this Court to review the award of the fees below. Like the Court of Appeals, we find no abuse of discretion in the trial court's award. Ms. Granville asks for an award of fees and costs on appeal to this court and has filed the necessary financial affidavits.

We remand to the trial courts to determine whether these parties have established sufficient financial need to warrant an award of attorneys fees and costs on appeal, the financial ability of the parties to pay, and if an award is warranted the proper amount.

DOLLIVER, SMITH, JOHNSON, and SANDERS, JJ., concur.

TALMADGE, J. (concurring/dissenting) — While I agree with the majority's holding that the plain language of RCW 26.10.160(3) and former RCW 26.09.240 provides the petitioners standing to seek visitation with the respective children in these consolidated cases, I disagree with the majority's view that such visitation intrudes unconstitutionally into the realm of parents' protected interests. By eliminating the limited right these statutes provides for nonparents to seek visitation with children, the majority opinion will have cruel and far-reaching effects on loving relatives, particularly grandparents of children like the Troxels here, depriving them in many instances of any contact with their grandchildren. For these reasons, I respectfully dissent.

The majority correctly determines the plain language of RCW 26.10.160(3) compels the conclusion that the petitioners in these cases had standing. But the majority holds RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of the child." Majority op. at 21 (quoting *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). This holding is based on two flawed premises: First, a parent's fundamental right to autonomy in child-rearing decisions is unassailable, and, second, the State's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness. Majority op. at 13-17.

A. Parental Rights Are Not Absolute

As the majority notes, parental rights regarding the care and custody of their children are well established. *See*

Majority op. at 13-14. It is equally true, however, such rights are not absolute. As the majority asserts, the Supreme Court in *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), indeed noted "custody, care and nurture of the child reside first in the parents[,]" but went on to hold:

> [b]ut the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.

Prince, 321 U.S. at 166-67 (citations omitted). The majority focuses on only a portion of the equation. The constitutional issue in these consolidated cases concerns the parameters and balancing of rights and interests of the State and child, as well as those of the parents.

We have previously addressed the parameters of the rights of parents and the State's parens patriae power to act in the child's best interests in *Sumey*, 94 Wn.2d 757. There, we balanced the rights of the parents, child and State, broadly interpreting the State's parens patriae right to intervene and protect a child as a valid justification for temporary residential placement of the child under RCW 13.32, stating:

The liberty and privacy protections of the due process clause of the Fourteenth Amendment establish a parental constitutional right to the care, custody, and companionship of the child. This constitutionally protected interest of parents has been described as a "sacred right" which is " 'more precious . . . than the right of life itself.' "

The parents' constitutional rights, however, do not afford an absolute protection against State interference with the family relationship. Although "[h]istorically, the natural parent's right to custody of a child . . . [was considered to be] absolute, barring a showing of unfitness . . . [g]rowing concern for the welfare of the child and the disappearance of the concept of the child as property has led to a gradual modification in judicial attitude." It is now well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a parens patriae right *and responsibility* to intervene to protect the child. As we observed in *State v. Koome*, 84 Wn.2d 901, 907, 530 P.2d 260 (1975),

> Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference . . . they are not absolute and must yield to fundamental rights of the child or important interests of the State.

> *Thus, in assessing the constitutionality of a procedure which infringes upon parents' rights to the care, custody, and companionship of their children, it is necessary to ascertain the proper balance between the parents' constitutional rights and the State's constitutionally protected parens patriae interest in protecting the best interests of the child.*

Sumey, 94 Wn.2d at 762-63 (most citations omitted) (emphasis added) (alterations in original). *Accord*, *Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 923, 929-30, 949 P.2d 1291 (1997).

Key to the balancing test we applied in *Sumey* was the degree of abridgment of parental rights which residential placement of the child entailed. We contrasted the temporary residential placement at issue with termination of parental rights and dependency proceedings. In so doing, we observed the requisite balancing called for appropriate justification for the severity of the abridgment of parental rights sought by the State. The termination of parental rights is an extreme abridgment of a parent's constitutional rights to care, custody and companionship of a child which requires the commensurately grave circumstance of harm (physical, mental or emotional) to the child resulting from the parent's conduct. But we contrasted this extreme abridgement with residential placement, explaining:

> [temporary] residential placement . . . does not infringe upon parental rights as severely as does

> a dependency adjudication or termination of parental rights . . . . An adjudication of dependency (on grounds such as parental abuse, neglect, or abandonment) can result in placement of the child in a foster home and transfer of certain legal rights and duties to the foster parents . . ., and can ultimately result in full termination of parental rights if the parents do not correct the behavior which led to the finding of dependency. In contrast, a [temporary] residential placement . . . does not result in the transfer of any legal rights and duties to the custodians of the child and such a placement cannot serve as a basis for a subsequent termination of parental rights.

Sumey, 94 Wn.2d at 763 (citations omitted). In *Sumey*, we upheld the placement of the child outside the home against the parent's wishes because:

> The degree of intrusion upon the parents' rights is relatively minor in that the parents retain custody over the child, the placement outside the home is designed to be temporary and to end as soon as the family conflict has been resolved . . . On balance, the substantial interests of the State and child are sufficient to justify the limited infringement upon the parents' rights.

Id. at 765. Similarly, where visitation is awarded to nonparents in furtherance of the best interests of the child under the visitation statutes at issue here, the parents retain

custody over the child. The allowance of visitation is even less intrusive than out of home residential placement of a child. Thus, our rationale in *Sumey* suggests where visitation is awarded under the statutes in question, the minor infringement on parental rights resulting from such visitation is permissible.

Furthermore, the United States Supreme Court cases striking down state action upon which the majority relies do not argue to the contrary. They involve substantial infringements of parents' (or others') rights. See Majority op. at 17-18, relying on *Wisconsin v. Yoder*, 406 U.S. 205, 219, 92 S. Ct. 1526, 1535, 37 L. Ed. 2d 15 (1972) (grave endangerment or destruction of free exercise of parents' religious beliefs); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 573, 69 L. Ed. 1070, 39 A.L.R. 468 (1925) (unreasonable interference with liberty of parents to direct the upbringing and education of their children where parents wanted to send their children to established religious or military schools); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923) (a prohibition on teaching foreign languages in any school to children who had not yet completed eighth grade); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (presumptive termination of unwed father's parental rights). *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (termination of parental rights based on insufficient evidentiary standard). Such is not the case here.

Instructive is the response of the Indiana Appellate Court, addressing the same argument the majority makes

here, based on many of the same cases upon which the majority relies. Upholding its Grandparent Visitation Act, the court in *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. Ct. App.), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997), opined:

> Unlike these significant infringements, visitation rights by grandparents as defined by the Act are less than a substantial encroachment on the parent's fundamental rights or the autonomy of the nuclear family. The Act contemplates occasional, temporary visitation, which may only be allowed if a trial court finds visitation to be "in the best interests of the child." . . . the Act does not presume that grandparent visitation is necessarily in the children's best interest. Instead, the burden is on the grandparent, as the petitioning party, to demonstrate . . . that court-ordered visitation is in the children's best interest. If such a showing is made, it falls to the court to evaluate the evidence, assess the circumstances, and carefully devise a visitation schedule that is in the children's best interest.
>
> As such, permitting grandparent visitation over the adoptive parents' objection does not unconstitutionally impinge upon the integrity of the adoptive family.

Sightes, 684 N.E.2d at 230 (citations omitted). The same is true of the visitation statutes in question here. The minor encroachment of parental rights possible under these statutes is permissible under *Sumey*.

B. Parens Patriae

The majority's insistence that a showing of harm to the child or parental unfitness is required before the State's parens patriae power may be brought to bear is incorrect. In *Sumey*, there was no assertion of parental unfitness or harm to the child, yet we upheld the temporary residential placement of a child outside the home as a valid exercise of the State's parens patriae power to act in the child's best interests. *See Sumey*, 94 Wn.2d at 762-65. *See also State v. Steinbach*, 101 Wn.2d 460, 679 P.2d 369 (1984), in which Justice Dolliver, dissenting on a different issue, explained our holding in *Sumey* as follows:

> *Sumey* involved the question of whether the residential placement procedures of former RCW 13.32 violate due process by authorizing placement of a minor *without a prior finding of parental unfitness*. In that case, the child had petitioned the court and been granted an ARP [alternative residential placement]. Her parents challenged the constitutionality of the statute. As the majority points out, the case discusses the importance of the parent-child relationship. *The holding, however, is that the "limited infringement upon parental rights" by the ARP does not violate due process.*

Steinbach, 101 Wn.2d at 464-65 (Dolliver, J., dissenting) (emphasis added). Indeed, the provisions of RCW 13.32 may be invoked where a parent and child are in fundamental conflict, without any showing of parental unfitness. The majority's analysis calls such statutes into question.

Similarly, in *In re Welfare of Key*, 119 Wn.2d 600, 836 P.2d 200, *cert. denied*, 507 U.S. 927, 113 S. Ct. 1302, 122 L. Ed. 2d 691 (1993), in the context of a dependency hearing, we rejected the natural parent's assertion that, absent a finding of parental unfitness, the court's finding that the handicapped daughter is dependent violated the mother's due process rights. Applying the *Sumey* balancing test, we held a finding of unfitness was not required in a dependency proceeding, noting:

> Ms. Key's interest is the same as that of any parent in a dependency proceeding. Her interest does not depend on whether she is found unfit. Instead, *the presence or absence of unfitness would seem to affect only the weight of the State's interest.*

Key, 119 Wn.2d at 611 (emphasis added). Thus, even in a dependency proceeding, again a more severe abridgment of parental rights than that possible under the visitation statutes at issue here, unfitness is not a threshold trigger for exercise of the State's parens patriae power. Both parental unfitness and harm to the child speak rather to the allowable degree of abridgment of parental rights which the state may impose in exercising its parens patriae power.[6]

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6. Thus the majority's reliance on *Sumey* in asserting "[t]his court has emphasized that a state can *only* intrude upon a family's integrity pursuant to its parens patriae right when 'parental actions or decisions seriously conflict with the physical or mental health of the child[,]' " Majority op. at 18 (emphasis added), is misplaced. Indeed, recognizing that the State has not merely a right, but the

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Likewise, even in custody cases, the best interests of the child govern and unfitness is not a prerequisite for the state to exercise its parens patriae power to act on behalf of the child's welfare. In *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981), a dissolution custody case in which the Court of Appeals affirmed the trial court's award of custody to the step mother of a 7-year-old deaf son born of the father's prior marriage based on the stepmother's extraordinary measures to aid the child, the Court of Appeals held a custody proceeding required a middle ground.

> [T]o give *custody* to a nonparent there must be more than the "best interests of the child" involved, but less than a showing of unfitness. In extraordinary circumstances, where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the state's interest in the child's welfare. There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the "best interests of the child" test. *Precisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown.*

Allen, 28 Wn. App. at 649 (emphasis added). Thus, even in a *custody* proceeding unfitness of a parent need not

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responsibility to intervene when the severe circumstance of harm to the child is present is the starting point of *Sumey*'s parens patriae analysis. It does not end there however, as the above discussion explains. *See Sumey*, 94 Wn.2d at 762-65.

necessarily be shown. Each case is unique, save for the overarching principle that the welfare of the child is the paramount concern.

The majority's position that, absent a threshold finding of parental unfitness or harm to the child, no intrusion on parental rights, no matter how slight, may be undertaken by the State as parens patriae acting on the child's behalf, cannot be reconciled with the above case law.

The majority also goes too far in claiming "the Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere *only* 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burden.' *Yoder*, 406 U.S. at 234." Majority op. at 17 (emphasis added). The cited case does not so hold. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court held the Free Exercise Clause of the First Amendment barred the application of compulsory school attendance law to Old Order Amish who did not send their children to school after the eighth grade because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215, 92 S. Ct. at 1533. *Yoder* turns on the free exercise claim asserted by the Amish parents and the unique facts of that case. The Supreme Court held where the interests of parents was *combined with a free exercise claim* of the nature present in that case, the state must show a compelling interest in requiring Amish parents to send their children to school beyond the eighth grade

contrary to their religious beliefs. Referencing *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), however, the Court went on to note that even where such greater justification for state action is required in light of the Amish parent's free exercise claim, parental action threatening harm to the child would not be tolerated.

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Yoder, 406 U.S. at 233-34. Thus, the Supreme Court in *Yoder* did *not* hold that harm is a threshold requirement for any encroachment upon parental rights, as the majority implies; but rather notes even where the circumstances of a particular case provide heightened protections for parental rights, the extreme circumstance of harm to the child clearly justifies state intervention. *Accord Prince*, 321 U.S. 158.

Likewise, the majority errs in concluding "[i]t is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child[,]" citing *Prince*, 321 U.S. at 170. Majority op. at 18. In *Prince*, the Supreme Court upheld, against assertions of free exercise and parental control, application of Massachusetts' child labor law prohibiting girls under 18 from selling publications (here religious literature) on the streets, finding the state's power to protect the child from harm was not

diminished by the presence or direction of the child's guardian. The exact parameters of the state's power to intrude into parental rights/free exercise were not discussed.[7] Regarding the limits of state power, the Court held only "the rightful boundary of [the state's] power has not been crossed in this case" and noting "[o]ur ruling does not extend beyond the facts the case presents." *Prince*, 321 U.S. at 170-71. Although *Prince* indicates state intervention in areas of religious practices or parental control is appropriate to prevent harm to a child, that case does not suggest harm to a child is a threshold requirement for any and all types of state encroachment of parental rights.

C. Grandparent Visitation Cases

Cases concerning the constitutionality of grandparent visitation statutes are also instructive as they address the constitutional legitimacy of intrusions into parental rights. The majority mentions only two such cases, *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993), and *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, *cert. denied*, 516 U.S. 942, 116 S. Ct. 377, 133 L. Ed. 2d 301 (1995). *See* Majority op. at 19-21. *Hawk* was decided on state constitutional grounds. *Hawk*, 855 S.W.2d at 582. *See also Beagle v. Beagle*, 678 So.2d 1271, 1275-76 (Fla. 1996) (holding Florida's grandparent visitation statute violative of the enhanced

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7. After noting the "custody, care and nurture of the child reside first in the parents," the Court went on to hold "neither rights of religion nor rights of parenthood are beyond limitation . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" *Prince*, 321 U.S. at 161-67 (citations omitted).

privacy rights found in art. 1, § 23 of the Florida Constitution, which provides privacy protections "broader in scope" than the federal constitution). Given the state constitutional bases of the *Hawk* and *Beagle* holdings, they are of little precedential or persuasive value here since the Washington Constitution (art. 1, § 7) affords no greater protection than the minimum protection conveyed by the federal constitution on matters other than search and seizure. *See Ramm v. City of Seattle*, 66 Wn. App. 15, 27, 830 P.2d 395 (1992). *Brooks* adopted the reasoning of *Hawk* but declared Georgia's grandparent visitation statute violative of both the state and federal constitutions. The *Brooks* majority, relying on termination cases, premised its holding on the notion that the extent of the intrusion upon parental rights to custody and control was irrelevant. *No* infringement of such rights, regardless of how small, was permissible absent a showing of harm to the child. *Brooks*, 265 Ga. at 194 n.6. We rejected such approach in *Sumey*. Indeed, our pronouncements on parens patriae in *Sumey* are more in harmony with the *Brooks* dissent which chided the majority there for its restrictive view, opining:

> Following Tennessee's lead, the majority maintains that the State's authority to assert itself as parens patriae "is permissible only where the health or welfare of a child is threatened." Majority, p. 193. However, in Georgia, the courts have acted as parens patraie when considering such nonthreatening items as a child's name change, and a purported father's petition of legitimation. In Georgia, the exercise of the parens patriae power has always had as its

> paramount consideration the best interests of the child, and its exercise has become synonymous with the child's best interests and welfare.

Brooks, 265 Ga. at 199-200 (Benham, Presiding J., dissenting).

The majority cites only the minority view and fails to mention cases such as *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992), upholding Kentucky's grandparent visitation statute against a federal constitutional challenge. *See also Hawk*, 855 S.W.2d at 577 n.1 ("[t]he United States Supreme Court was asked to review the *King* case on a right-to-privacy theory and declined. The Supreme Court has never entertained a case involving the right to visitation of grandparents or other third parties." (Citation omitted)). In fact, the majority of cases in the United States have upheld grandparent visitation statutes. In upholding the constitutionality of Utah's Grandparent Visitation Statute, the Utah Court of Appeals noted:

> the vast majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld those statutes as constitutional. *See Sketo v. Brown*, 559 So.2d 381, 382 (Fla.App.1990); *Bailey v. Menzie*, 542 N.E.2d 1015, 1020 (Ind.App.1989); *Spradling v. Harris*, 13 Kan.App.2d 595, 778 P.2d 365, 368 (1989); *King v. King*, 828 S.W.2d 630, 631-32 (Ky.), *cert. denied*, [506 U.S. 941], 113 S.Ct.

378, 121 L.Ed.2d 289 (1992); *Herndon v. Tuhey*, 857 S.W.2d 203, 208 (Mo. 1993) (en banc); *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478, 481 (1985); *People ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 423, 429 N.E.2d 1049, 1052 (1981); *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex.App.1975). While the Tennessee Supreme Court has held that Tennessee's grandparent visitation statute is unconstitutional under the Tennessee Constitution, the court did not decide whether the statute is unconstitutional under the United States Constitution. *See Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993). To date, only Georgia has declared a statute permitting court-ordered grandparent visitation, if in the best interest of the child, to be unconstitutional under the United States Constitution. *See Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, 773-74 (1995).

Campbell v. Campbell, 896 P.2d 635, 644 n.18 (Utah App. 1995).

As with RCW 26.10.160(3) and former RCW 26.09.240, the Kentucky statute at issue in *King* allowed visitation by nonparents (i.e., grandparents) if in the best interest of the child. *Cf.* KY. REV. STAT. ANN. § 405.021, RCW 26.10.160(3) and former RCW 26.09.240. The denial of certiorari by the Supreme Court suggests the Kentucky Supreme Court correctly determined the application of the similar Kentucky statute did not go too far in intruding into

the fundamental rights of parents under the federal constitution. As the Washington Constitution affords no greater protection than the federal constitution in this area, *see Ramm v. City of Seattle*, 66 Wn. App. 15, 27, 830 P.2d 395, *review denied*, 120 Wn.2d 1018, 844 P.2d 437 (1992), Washington's similar provisions likewise withstand a constitutional challenge.[8] *See also Sightes v. Barker*, 684

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8. The majority has correctly refrained from an analysis based on state constitutional grounds as urged by appellant Stillwell who asserted "[a]rticle 1, § 7 of the Washington Constitution mandates greater protection of the 'private affairs' of the family under the six . . . factors . . . in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986)[,]" Br. of Appellant at 14-18. This argument was rejected in *Ramm v. City of Seattle*, 66 Wn. App. 15, 23-27, 830 P.2d 395, *review denied*, 120 Wn.2d 1018, 844 P.2d 437 (1992), wherein the Court of Appeals held:

> Our examination of the six *Gunwall* factors persuades us that, *on matters not involving search and seizure*, Const. art. 1, § 7 affords no greater protection than the minimum protection afforded by the federal constitutional analysis.

Ramm, 66 Wn. App. at 27 (emphasis added). Stillwell cites *In re Detention of D.A.H.*, 84 Wn. App. 102, 110, 924 P.2d 49 (1996), for the proposition that our state constitution provides greater privacy protection than the expectations created by the Fourth Amendment. Reply Br. of Appellant at 9. *D.A.H.* relies, however, on a search and seizure case, *State v. Boland*, 115 Wn.2d 571, 577-78, 800 P.2d 1112 (1990), for that statement and failed to recognize the distinction between autonomy and search and seizure cases as *Ramm* does. *See Ramm*, 66 Wn. App. at 23-27, discussing *Boland*.

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N.E.2d 224 (Ind. App.) (upholding Indiana's Grandparent Visitation Act against a federal constitutional challenge as a less than substantial encroachment on the parent's rights and a legitimate exercise of the state's parens patriae power where such visitation serves the child's best interests), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997).

Even in the absence of specific statutory authority a court may exercise its parens patriae power to act in the child's best interests regarding visitation matters, as the New Hampshire supreme court in *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478 (1985). Recognizing the changing circumstances of modern families, the *Roberts* court awarded visitation rights to grandparents, over objections of the natural parent, based on the court's equitable powers. While noting the importance of parental rights the court opined:

> Parental autonomy is grounded in the assumption that natural parents raise their own

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(Cont'd)

Stillwell also misstates *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996); which found the Florida grandparent visitation statute violative of the state constitution, asserting the case to note "Washington's Constitution provides express privacy protections similar to those relied upon by the Florida Supreme Court. 678 So. 2d at 1275 n.9." Br of Appellant at 18. However, in *Beagle*, the Florida court actually notes the Florida Constitution provides greater privacy protection than the federal constitution and lists Washington among states which include privacy protections in their *search and seizure* constitutional provisions. *See Beagle*, 678 So. 2d at 1275 & n.9. This interpretation comports with the *Ramm* holding (cited above) noting heightened protection regarding searches and seizures only.

children in nuclear families, consisting of a married couple and their children. The family has been seen as the "basic building block" of society. Parental autonomy strengthens the family and the entire social fabric "by encouraging parents to raise their children in the best way they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene."

The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded .... More varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families; as remarriages create step-families; as some parents abandon their children; as others give them to temporary caretakers; and as still others are judged unfit to raise their own children.

One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact.

> It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

Roberts, 126 N.H. at 391-92 (citations omitted). Emphasizing the best interests of the child to be of paramount concern the *Roberts* court held exercise of the parens patriae power to act in the child's welfare was appropriate here:

> . . . the better view is that the superior court, as an instrumentality of the State, may use its *parens patriae* power to decide whether the welfare of the child warrants court-ordered visitation with grandparents to whom close personal attachments have been made.
>
> . . . .
>
> In determining whether or not to grant grandparental visitation, the court must consider the best interests of the child. In doing so, it recognizes that it is primarily "the right of the child to . . . know her grandparents" which is being protected and not the interests of the grandparents.
>
> Moreover, in balancing the child's rights to know and associate with her grandparents against

> the parent's right to custodial autonomy, we note that we are dealing here only with visitation rights. "[G]ranting visitation is a far lesser intrusion, or assertion of control, than is an award of custody" and thus not nearly as invasive of parents' rights.
>
> Our holding today is in accord with the position taken by a number of other jurisdictions, which have found non-statutory bases for granting grandparents visitation rights.

Roberts, 126 N.H. at 392-93 (citations omitted).

D. Sufficiency of the "Best Interest" Standard

Although the majority recognizes that the severing of a meaningful relationship a child enjoys with a nonparent may be harmful to the child,[9] its disposition of this case undermines the opportunity to sustain such relationships. This need not be the case. The faults the majority sees in RCW 26.10.160(3) and former RCW 26.09.240 are more imagined than real. Both RCW 26.10.160(3) and former 26.09.240 provide that the trial court may order visitation rights for a nonparent "when visitation may serve the best interest of the child[,]" but the majority finds this standard insufficient, and faults the statutes for lacking enumerated factors such as a substantial relationship between petitioner

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9. "We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child." Majority op. at 20.

and child or consideration of any past abuse of the child by the petitioner. Majority op. at 19-21. However, such factors/considerations are clearly subsumed under the "best interests of the child" determination[10] which is unique in each case.

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10. Although it appears the majority would be more comfortable with an enumeration of "best interest" factors such as those appearing in the current version of RCW 26.09.240(6), even that statute makes clear that such enumeration is illustrative only. *See* RCW 26.09.240(6) ("The court *may* consider the following factors when making a determination of the child's best interests:") (emphasis added) and 240(6)(h) ("Any other factor relevant to the child's best interest."). RCW 26.09.240(6) states in full:

> (6) The court may consider the following factors when making a determination of the child's best interests:
>
> (a) The strength of the relationship between the child and the petitioner;
>
> (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
>
> (c) The nature and reason for either parent's objection to granting the petitioner visitation;
>
> (d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
>
> (e) The residential time sharing arrangements between the parents;
>
> (f) The good faith of the petitioner;

(Cont'd)

See Washington State Coalition for the Homeless v. Department of Soc. & Health Servs., 133 Wn.2d 894, 931-32, 949 P.2d 1291 (1997) ("Ultimately what is in the best interests of a particular child depends on 'a highly fact-specific inquiry that cannot be reduced to a mathematical equation.' ").[11]

(Cont'd)

> (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
>
> (h) Any other factor relevant to the child's best interest.

11. Should a listing of "best interest" factors be necessary, as the majority insists, we are not without authority to provide them. Again, the New Hampshire supreme court's approach in *Roberts* is instructive. Like the majority here, the *Roberts* court recognized the importance of continuity and stability in children's close relationships, *Roberts*, 126 N.H. at 392-93, and, relying on its equity powers, established six factors to be considered when acting in the child's best interests when considering a petition for visitation by grandparents.

> Factors which the court may consider in determining whether or not to grant grandparental visitation include: [1] whether the child has lived with the grandparents and the length of that residence; [2] whether the grandparents have stood *in loco parentis* to the child; [3] the effect on the child's physical and emotional health engendered by visitation or lack of it; [4] the circumstances which resulted in the absence of a nuclear family; and [5] the child's preference regarding visitation . . . . [6] The fact that there is

(Cont'd)

(Cont'd)

> friction between the parents and grandparents will not in and of itself preclude granting visitation rights but may be considered among all the surrounding circumstances.

Roberts, 126 N.H. at 394 (citations omitted). Substituting "petitioner" for "grandparents" in the above criteria would provide the factors the majority seeks, and like the New Hampshire supreme court, we may provide trial courts with guiding considerations in matters concerning a child's well-being. *See In re Dependency of J.B.S.*, 123 Wn.2d 1, 11, 863 P.2d 1344 (1993) (holding the best interests of the child prevail when the rights of parent and child conflict, and providing guiding considerations for the trial court in the event of a future motion for change of placement). Any such enumeration of factors, however, would be illustrative only, and subsumed under the "best interest" standard in any event. Such listing is therefore unnecessary. Under the umbrella of the best interest standard a trial court considers the unique circumstances of each case when deciding issues affecting a child's welfare. As we stated in the dependency case of *In re Welfare of Becker*, 87 Wn.2d 470, 477-78, 553 P.2d 1339 (1976):

> While our statutes and judicial opinions may set forth the goal, the criteria for establishing the best interests for the welfare of the child are conspicuous by their absence. The complexity of the cases and the need for careful individual treatment militates against the mandatory consideration of certain specified factors in every case. Nevertheless, the courts have broad discretion and are allowed considerable flexibility to receive and evaluate all relevant evidence in reaching a decision that recognizes both the welfare of the child and parental rights.

(Citations omitted.)

We have long held that trial courts have broad discretion to determine the best interests of a child in cases touching upon a child's welfare, and such determinations are given great deference. In the context of a dependency proceeding, we stated in *Aschauer*:

> While the criteria for establishing the best interests of the child are not capable of specification, each case being largely dependent upon its own facts and circumstances, the proof necessary in order to deprive a person of his or her parental rights must be clear, cogent and convincing. If there is substantial evidence which the lower court could reasonably have found to be clear, cogent and convincing, an appellate court should not disturb the trial court's findings. Deference paid to the trial judge's advantage in having the witnesses before him is particularly important in deprivation proceedings, when it is borne in mind that continuity in the parent-child relationship, whether the parent figure be the natural parent or not, is increasingly recognized as a significant factor in a child's normal development.
>
> . . . Courts are always reluctant to deprive parents of rights with respect to their children, and it is particularly sad when the parent cares for the child and desires to be a good parent, as appears to be the case here. However, it is the court's duty to see that those rights yield, when to accord them dominance would be to ignore the needs of the child.

In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980) (citations omitted).

The best interests of the child remain the court's paramount concern. This inquiry is the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children. *See, e.g., Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 923, 949 P.2d 1291 (1997) ("As in all matters dealing with the welfare of children, the court must additionally act in the best interests of the child."); *Aschauer*, 93 Wn.2d at 695) ("This court has repeatedly said that the goal of a dependency hearing is to determine the welfare of the child and his best interests."); *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973) ("a child's welfare is the court's primary consideration . . . when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail"); *In re Marriage of Littlefield*, 133 Wn.2d 39, 51-52, 940 P.2d 1362 (1997) (noting in the absence of parental cooperation in a postseparation action, the trial court is given broad discretion to develop and order a parenting plan according to the guidelines set forth in RCW 26.09.187(3) and based upon the best interests of the children at the time of trial); *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 771, 938 P.2d 345, *review denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997) (noting the best interests of the child are paramount in paternity proceedings, the Court of Appeals upheld trial court's denial of the putative father's attempt to reopen/ challenge paternity determination made 13 years prior).

While our case law supports use of the "best interest" standard in matters relating to the welfare of children, Judge

Ellington's dissent in *Troxel* deftly explains why this standard is particularly appropriate here:

> The statute itself contains the Legislature's standard for both threshold and standing, in its requirement that the visitation serve the best interests of the child.
>
> Many considerations could explain a legislative decision to leave RCW 26.10.160(3) unamended. Grandparent visitation issues come most readily to mind. For if a custody action must be pending before a grandparent may petition, then a grandparent whose child is dead — as is the Troxels' son — and who can thus never expect a RCW 26.09 petition opportunity (because no petition will ever be pending under that chapter) also has no recourse under RCW 26.10 *unless* willing to allege the remaining parent is unfit — hardly a prelude to amicable relations among family members. Is there never then to be a circumstance where a child indeed has a fit parent, but also has strong ties to grandparents, warm and beneficial ties which the child's best interests call for protecting?
>
> The limitations which public policy may place on such petitions are fertile grounds for debate . . . But these are matters for the Legislature, and for now, the current statute expresses one policy approach: any person may petition at any time, so long as the child's best

> interests are served. It cannot be said that this approach is absurd, or even out of harmony with RCW 26.09.240.

In re Visitation of Troxel, 87 Wn. App. 131, 142-43, 940 P.2d 698 (1997) (Ellington, J., dissenting) (italics and footnotes omitted). Indeed, the broad language of RCW 26.10.160(3) and former RCW 26.09.240 furthers the best interests of the child by tacitly recognizing the growth of nontraditional families and the important role members of such families may play in the child's life.

The best interest standard lacks nothing in its brevity and retains the necessary flexibility required by a trial court in addressing the infinite circumstances and possibilities which surround child welfare determinations such as the nonparent visitation at issue in these cases. We should reiterate the best interests of the child remain the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children.[12] In the

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12. *See Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996). While finding the Florida grandparent visitation statute violative of the state constitution, the Florida Supreme Court acknowledged other states had upheld their grandparent visitation statutes against federal constitutional challenges, noting: "[i]n those cases a best interest standard was deemed to be sufficient." *Id.* at 1275 (citing *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Lehrer v. Davis*, 214 Conn. 232, 571 A.2d 691 (1990); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989); *Spradling v. Harris*, 13 Kan. App. 2d 595, 778 P.2d 365 (1989); *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992); *Ridenour v. Ridenour*, 120 N.M. 352, 901 P.2d 770 (Ct. App.), *cert. denied*, 120 N.M. 68, 898 P.2d 120 (1995)).

consolidated cases before us, the trial courts in *Troxel* and *Smith* entered specific findings that visitation with the petitioners would be in the respective children's best interest. *See Troxel* Findings of Fact 2.3E, Clerk's Papers at 128; and *Smith* Findings of Fact 2.17, Clerk's Papers at 6; Conclusions of Law 3.3, Clerk's Papers at 9. The majority ignores these findings.

E. Harassment Suits

The majority also faults the statutes in question for lacking safeguards to prevent stable families from defending in court against frivolous petitions for visitation. Majority op. at 20. This imagined threat is also unfounded. Courts are amply provided with the means of deterring such abuses. *See* CR 11 (authorizing sanctions, expenses and attorney fees for frivolous claims which may be imposed sua sponte by a trial court); *see also* RCW 26.10.080 and 26.09.140 (providing for costs and attorney fees at the court's discretion regarding "any proceeding under this chapter").

CONCLUSION

The majority correctly holds the nonparents in these consolidated cases have standing to petition for visitation under the plain language of RCW 26.10.160(3) and former RCW 26.09.240. The majority is incorrect, however, in holding that such visitation, when awarded upon determination of the best interests of the child, impermissibly infringe the rights of parents. Since we have previously approved an encroachment of parental rights of greater magnitude than that possible under the statutes in question, the majority's position is untenable.

In practical terms, the majority would deprive nonparties to custody proceedings in dissolutions from any opportunity to have visitation with a child even where the relationship with the child is significant and in the child's best interest. This is cruel both to the child who may want and need a relationship with grandparents, relatives, and others, and to those third parties, many of whom are the child's blood relatives. I decline to apply such an approach that is oblivious to the varied relationships that flourish in our society.

As the requisite finding of best interest of the child has been made in *Troxel* and *Smith*, the trial courts' orders granting visitation should be reinstated/affirmed. Because the trial court in *Wolcott* found petitioner Clay to have no standing under a theory we reject, and did not reach the issue of best interest of the child, that case should be remanded for further proceedings including a determination regarding the best interest of the child. I would reverse the Court of Appeals in *Wolcott* and remand for further proceedings, reverse the Court of Appeals in *Troxel* and reinstate the trial court's order, and affirm the trial court in *Smith*.

DURHAM, C.J., and GUY and ALEXANDER, JJ., concur with TALMADGE, J.

APPENDIX B — OPINION OF THE WASHINGTON COURT OF APPEALS DATED JULY 28, 1997 IN *IN RE VISITATION OF TROXEL*, 87 Wn. App. 131

[No. 36737-4-I. Division One. July 28, 1997.]

In the Matter of the Visitation of NATALIE ANNE TROXEL, ET AL., JENIFER TROXEL, ET AL., *Respondents*, and TOMMIE GRANVILLE, *Appellant*.

* * *

COX, J. — Tommie Granville, n/k/a Wynn, appeals the trial court's visitation award to Jenifer and Gary Troxel, the paternal grandparents of her daughters Natalie and Isabelle. Wynn argues that the grandparents lack standing to petition for two reasons. First, there was no pending custody proceeding at the time of the grandparents' petition. Second, her husband Kelly Wynn adopted both girls.

Wynn also challenges evidentiary rulings by the trial court, contends it applied the wrong standard in making its decision, and maintains the findings and conclusions are inadequate. Moreover, she challenges the constitutionality of the visitation statute. Because the Troxels had no standing to petition for visitation in the absence of a pending custody proceeding, we reverse.

Brad Troxel and Tommie Wynn had a relationship that ended in June 1991. Natalie and Isabelle are their daughters and the granddaughters of Jenifer and Gary Troxel. After the separation, Brad lived with the Troxels and regularly brought Natalie and Isabelle to the Troxels' house for weekend visitation. Brad committed suicide in May 1993.

Appendix B

After Brad's death, the Troxels saw Natalie and Isabelle regularly, though the girls did not stay overnight at the Troxel residence. In October 1993, Wynn informed the Troxels that she wished to limit visitation to one short visit per month. The Troxels declined Wynn's offer. Between October and December 1993, they did not see Natalie and Isabelle. They did not resume regular visitation with the girls until April 1994, when a court commissioner entered a temporary visitation order.

In December 1993, Jenifer and Gary Troxel commenced this action, seeking court-ordered visitation with their granddaughters. At the time of trial in December 1994, Natalie and Isabelle were five and almost three years old, respectively.

At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation during the summer. Based on the recommendation of her counselor, Dr. Nora Young, Wynn asked the court to order one day of visitation each month with no overnight stay. Dr. Young also suggested that the grandparents participate in the Wynns' holiday celebrations. The court heard testimony from the Troxels, their son-in-law, and two expert witnesses that Wynn hired. Based on the evidence, the trial court issued its oral ruling and entered a visitation decree ordering visitation of one weekend per month, one week in the summer, and four hours on the birthday of each of the Troxels.

Wynn sought review. We remanded the case for entry of findings of fact and conclusions of law. We later directed the parties to file additional briefs.

Appendix B

Standing

Wynn argues that the Troxels lack standing to petition for visitation. The Troxels counter that the plain meaning of RCW 26.10.160(3) allows them to so petition. We hold that the Troxels lack standing because no child custody proceeding was pending when the Troxels commenced this action.

At issue is the meaning of RCW 26.10.160(3). Statutory construction is a question of law that we review de novo.[1] The primary objective of statutory construction is to carry out the intent of the Legislature by examining the language of the statute.[2] We give words their plain meaning unless a contrary intent appears.[3] We also must construe statutes "as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences which could result from a literal reading."[4]

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1. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993).

2. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 809, 756 P.2d 736 (1988).

3. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986).

4. *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963).

RCW 26.10.160(3) provides:

> *Any person* may petition the court for visitation rights *at any time* including, but not limited to, custody proceedings. The court may order visitation rights for *any person* when visitation may serve the best interest of the child whether or not there has been any change of circumstances.[5]

A literal reading of this statute could lead to the sort of absurd result that our canons of statutory construction forbid. Does "any person" have standing to petition "at any time" for visitation with a child? For example, could a member of the state Legislature who has displeased a constituent find herself faced with the considerable expenditure of time, money, and emotional energy to oppose a wholly frivolous petition by that constituent? Should this occur without any showing that the parent was unfit or that the family was unstable or that the child was otherwise facing any threat to its well-being? Our Legislature could not have intended such an absurd and potentially pernicious result from so broad a reading of the statute.

This court stated in dicta in *In re Custody of B.S.Z.-S.*[6] that the third-party visitation provision in RCW 26.10.160(3) applies only in the context of actions for child custody and questions of visitation that arise in custody

5. (Emphasis added.)

6. 74 Wn. App. 727, 731, 875 P.2d 693 (1994).

actions. RCW 26.10.030(1) provides that a petitioner may commence a third-party child custody proceeding only when a child is not in the custody of one of its parents or if the petition alleges parental unfitness. That limitation is consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the "care, custody, and management" of their children.[7] The Legislature could not have intended to open the door to "any" person petitioning for visitation "at any time," having created such strict standing requirements for third-party custody proceedings.

RCW 26.10 is entitled "Nonparental Actions for Child Custody." The Legislature's statement of intent declares that it enacted RCW 26.10 to "reenact and continue the law relating to third-party actions involving custody of minor children."[8] That statement of intent is also consistent with restricting petitions for visitation to custody proceedings, rather than allowing petitioners to commence new proceedings when no custody or other action is pending.

Our reading of the limitations of RCW 26.10.160(3) finds further support in the statutory history of this statute and RCW 26.09.240, a parallel provision. In 1987, the Legislature reenacted and continued the law relating to third party actions involving custody of minor children in order to distinguish it from the 1987 parenting act amendments. The 1987 version of RCW 26.09.240 provided, in part, that

7. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

8. RCW 26.10.010.

"[a]ny person may petition the court for visitation rights at any time." Similarly, RCW 26.10.160, as originally enacted in 1987, provided, in part, that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."

Aside from some renumbering,[9] the portion of RCW 26.10.160(3) that is relevant to this matter has remained unchanged since enactment. In 1989, the Legislature substituted "a person other than a parent" for "any person" in RCW 26.09.240,[10] but the relevant language remained otherwise unchanged until last year.

In its 1996 session, the Legislature amended RCW 26.09.240 to limit the circumstances under which a nonparent may petition for visitation rights. First, a "person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter."[11] Second, even where such an action is pending, a court must dismiss a visitation petition unless the petitioner "can demonstrate by clear and convincing evidence that a significant relationship exists with the child with whom visitation is sought."[12] If the court dismisses the petition on that basis,

9. Laws of 1996, ch. 303, § 2, p. 1636; Laws of 1994, ch. 267, § 2, p. 1698; Laws of 1989, ch. 326, § 2, p. 1605.

10. Laws of 1989, ch. 375, § 13, p. 1969.

11. RCW 26.09.240(1).

12. RCW 26.09.240(3).

the petitioner must pay reasonable attorney fees and costs to the respondent.[13]

In 1987, the Legislature enacted virtually identical provisions that have subsequently proceeded on parallel tracks. We can see no plausible reason why the Legislature would amend RCW 26.09.240 and not RCW 26.10.160(3). Therefore, we must assume that the Legislature's failure to similarly amend the latter statute was the result of an unintentional oversight.

For all of the reasons discussed above, whether or not the Legislature overlooked amending RCW 26.10.160(3) when it amended RCW 26.09.240, we believe it did intend that a custody proceeding be in effect before third parties could petition for visitation.

Accordingly, we hold that a petition for visitation under RCW 26.10.160(3) must be contemporaneous with a proceeding for child custody.[14] There was no such proceeding when the Troxels filed their petition. The Troxels did not have standing to bring their petition for visitation.

The Troxels argue that they have standing under RCW 26.09.240(1) because of a proceeding in 1992 under the Uniform Parentage Act[15] that resulted in a parenting plan

13. RCW 26.09.240(3).

14. *In re Visitation of Wolcott*, 85 Wn. App. 468, 933 P.2d 1066 (1997).

15. RCW 26.26.

for these children. No such decree is in the record in this case. In any event, Division III of this court has properly rejected the contention that RCW 26.26.130(6) effectively invokes the dissolution statute: "[T]he reference to RCW 26.09 is merely the direction to apply the same procedures and criteria as those used in the Parenting Act of 1987, LAWS OF 1987, ch. 460, in formulating a paternity parenting plan."[16] The Troxels' argument is unpersuasive.

Wynn makes several other challenges to the visitation decree. She argues that her husband's adoption of both girls eliminates the Troxels' right to petition for visitation. She also claims that the trial court abused its discretion by failing to follow the recommendations of her expert witnesses. In addition, Wynn argues that the visitation statute impermissibly interferes with parents' constitutionally protected interest in child-rearing. She also claims that, in determining the best interests of the child in a nonparental visitation proceeding, a court's inquiry should be whether failure to order visitation would be detrimental to the child's development. Alternatively, she suggests that a court should apply the standards of the recently revised statute governing nonparental visitation in dissolution proceedings to the question of the child's best interests. Finally, she argues that, under either test, the findings of fact and conclusions of law in this case were inadequate to support the award. We do not reach these questions because of our disposition based on a lack of standing.

We reverse the visitation decree and dismiss the Troxels' petition for visitation.

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16. *In re Custody of Brown*, 77 Wn. App. 350, 355, 890 P.2d 1080 (1995).

GROSSE, J. (concurring) — I write separately to underscore the salient fact behind the majority opinion: The Legislature has rejected the approach advocated by the dissent,[17] and an appeal to the people by initiative failed to gain the requisite signatures.[18] So, while the legislative approach may lack logic and common sense, it is the approach chosen by the policy makers with plenary authority over this subject.

ELLINGTON, J. (dissenting) — I must respectfully disagree with the majority's construction of the statute involved here, and with its reliance on dicta in *In re Custody of B.S.Z-S.*, 74 Wn. App. 727, 875 P.2d 693 (1994). I therefore dissent.

Petitioners commenced this action under RCW 26.10.160(3), which grants to "any person" the opportunity to petition for visitation rights "at any time including, but not limited to, custody proceedings." This language is plain and unambiguous.

As the majority notes, from 1987 to 1996, RCW 26.10.160(3) had a close parallel in RCW 26.09.240, which read:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

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17. H.B. 1973, 55th Leg., Reg. Sess. (Wash. 1997).

18. Initiative 672 (initiative failed for lack of signatures).

> A person other than a parent may petition the court for visitation rights at any time.
>
> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

In 1996, RCW 26.09.240 was amended to provide, inter alia:

> A person other than a parent may petition the court for visitation with a child at any time or may intervene in a pending dissolution, legal separation, or modification of parenting plan proceeding. A person other than a parent may not petition for visitation *under this section* unless the child's parent or parents have commenced an action *under this chapter*.

RCW 26.09.240(1) (emphasis added).

The limiting language underscored above states a legislative intent to confine the new limitation, requirement of a pending action, to nonparent visitation petitions filed under RCW 26.09, entitled "Dissolution of Marriage — Legal Separation." It does not indicate any intent regarding nonparent visitation provisions in other chapters. RCW 26.10 is entitled "Nonparental Actions for Child Custody." Its visitation section quoted above was not amended.

The majority concludes the Legislature simply overlooked amending RCW 26.10.160(3) when it amended

RCW 26.09.240. While this certainly is a possibility, courts do not read statutes into or out of existence merely because of possible legislative oversight. The concern expressed by the majority is that a literal reading of RCW 26.10.160(3) could lead to absurd results because if "any person" could file a petition, frivolous petitions motivated by greed or hostility might result. I do not share this fear. I heard no reports of such petitions before the 1996 amendment, and trial courts are well-equipped to deal with frivolous petitions in any event.

The majority also relies on dicta from *In re Custody of B.S.Z-S.*, 74 Wn. App. at 731, stating that the third-party custody provision in RCW 26.10.160(3) applies only in the context of custody actions. I must respectfully disagree with that dicta. RCW 26.10.160(3) specifically states that a third-party visitation petition is available "at any time including, but not limited to, custody proceedings." The *B.S.Z-S.* reading of the statute is not supported by its plain language. It follows that I must respectfully disagree with the majority here, when it states, "The Legislature could not have intended to open the door to 'any' person petitioning for visitation 'at any time,' having created strict standing requirements for third-party custody proceedings." Majority at 135. This statement seems to me, with all due respect, entirely conclusory.

The imposition of strict requirements for third-party *custody* petitions does not lead inexorably to the conclusion that the same requirements were intended to apply to *visitation* petitions. On the contrary, custody and visitation are vastly different matters. A petition for custody amounts

to an attempt to wrest one's child permanently from one's care and control. A petition for visitation, on the other hand, is an attempt merely to gain a claim on some time with the child, and interferes distinctly less in the parents' autonomy. The Legislature can sensibly create different thresholds for these different proceedings.

Previously, this court attempted to construe the governing statute to include "change of circumstances" threshold requirements for third-party petitions. This construction was immediately rejected by the Legislature. In 1976, RCW 26.09.240 read essentially as does RCW 26.10.160(3) today. (Third-party actions were separated in 1987, when RCW 26.10 was passed.) In construing a visitation petition under then RCW 26.09.240, Division II of this court held that "in the absence of a threshold change of status affecting the family unit, RCW 26.09.240 does not authorize the court to grant visitation rights to a third person, including a child's maternal grandparent." *Carlson v. Carlson*, 16 Wn. App. 595, 597, 558 P.2d 836 (1976). The court's enumeration of changes in status which might justify such an order included death of one or both of the natural parents, dissolution or separation, child abuse or abandonment. The court stated:

> In the absence of a threshold situation so affecting the interests of the child with regard to the continuity of the family unit, the welfare of the child will seldom, if ever, be served by a judicially imposed overriding of parental discretion to determine whether a third person, distinct from the basic family unit, shall be

> permitted the privilege of visitation with the child.

Carlson, 16 Wn. App. at 597-98.

Wise as these considerations may have appeared, the Legislature promptly rejected them, amending the statute in 1977 to permit third-party visitation petitions "whether or not there has been any change of circumstances." In *Marriage of Klouse*, 30 Wn. App. 492, 494, 635 P.2d 773 (1981), the court characterized the amendment bluntly: "the impact of the 1977 amendment was to negate the requirement of showing a material change in circumstances."

The language construed in *Klouse* survives today intact in RCW 26.10.160(3), and I believe the majority's attempt to add a standing requirement is as misguided as was the *Carlson* court's attempt to add a threshold requirement. The statute itself contains the Legislature's standard for both threshold and standing, in its requirement that the visitation serve the best interests of the child.

Many considerations could explain a legislative decision to leave RCW 26.10.160(3) unamended. Grandparent visitation issues come most readily to mind. For if a custody action must be pending before a grandparent may petition, then a grandparent whose child is dead — as is the Troxels' son — and who can thus never expect an RCW 26.09 petition opportunity (because no petition will ever be pending under that chapter) also has no recourse under RCW 26.10 *unless* willing to allege the remaining

parent is unfit[19] — hardly a prelude to amicable relations among family members. Is there never then to be a circumstance where a child indeed has a fit parent, but also has strong ties to grandparents, warm and beneficial ties which the child's best interests call for protecting?

The limitations which public policy may place on such petitions are fertile grounds for debate. One may ask whether such petitions should be available at all in cases where both parents live with the children and oppose the petition, whether death or divorce or separation should affect, and, if so, how; whether adoption by a step-parent should affect, and so on.[20] But these are matters for the Legislature, and for now, the current statute expresses one policy approach: any person may petition at any time, so long as the child's best interests are served. It cannot be said that this approach is absurd, or even out of harmony with RCW 26.09.240.[21]

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19. The allegation required is that the child has no fit parent, or placement with an otherwise fit parent would be detrimental to the child. *See Custody of Stell*, 56 Wn. App. 356, 365, 783 P.2d 615 (1989).

20. These issues are frequent topics in the current legal literature. *See e.g.*, Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996).

21. As to the issue of constitutionality of nonparent visitation, I assume for purposes of this dissent the constitutionality of the present statute and expect to maintain that conclusion in the future, but proper analysis of those issues awaits their presentation on more extensive briefing than was submitted here.

I must thus respectfully dissent from the reasoning and result of the majority, and from its holding that under RCW 26.10.160(3), a custody petition must be pending before a visitation petition will lie.[22]

I would not simply affirm, however. The trial court here was not presented with any guidance as to the proper test to be applied in a case such as this. The findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings. And while I believe RCW 26.10.160(3) should not be read as incorporating the standing requirement of RCW 26.09.240, I would freely and generously borrow from RCW 26.09.240 its excellent, albeit not exhaustive, list of factors indicating whether third-party visitation is in the best interests of the child. See RCW 26.09.240(5)(a). A significant preexisting relationship, balanced against the impact on the existing family structure, is the framework. Within that framework, each case will be different. Because these factors were not addressed by the trial court, I would remand for further proceedings.

One final issue remains. These children have been adopted by their stepfather, or so the briefs advise us. Under *Mitchell v. John Doe*, 41 Wn. App. 846, 706 P.2d 1100 (1985), and *Bond v. Yount*, 47 Wn. App. 181, 734 P.2d 39 (1987), adoption — by strangers *or relatives* — terminates standing to petition for visitation. These holdings are premised on a privacy rationale:

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22. It follows that I must respectfully disagree with the opinion reaching the same result in *In re Visitation of Justin Ross Wolcott*, 85 Wn. App. 468, 933 P.2d 1066 (1997).

There is no policy stronger or more consistently followed in this state than that protecting the sanctity and privacy of adoptions. When an adoption has become final, previous ties to natural parents are completely severed and a wholly new relationship is created. The confidentiality of the new, as well as the defunct, relationship becomes virtually inviolate. The legislative policy concerning this transformation is reflected not only in the adoption statute, but in the probate code as well. This policy has been affirmed consistently by the courts. "The legislative policy of providing a 'clean slate' to the adopted child permeates our scheme of adoption." The strength of this policy is illustrated by the reaction of our courts to the latter day attempt, buttressed by a wealth of arguments, to strip the mantle of confidentiality from adoption records. That attempt has been firmly rejected.

Mitchell, 41 Wn. App. at 849-50 (citations and footnote omitted) (quoting *In re Estates of Donnelly*, 81 Wn.2d 430, 437, 502 P.2d 1163, 60 A.L.R.3d 620 (1972)).

Not only has the legislative concern for privacy lessened somewhat since *Mitchell*,[23] the rationale is inapplicable here in any event. Where a stepparent adopts, ties to one natural parent remain intact, and virtually no confidentiality

23. See RCW 26.33.295 (authorizing open adoption agreements) and RCW 26.33.343 (authorizing limited searches for birthparents of an adopted child).

concerns exist. I would therefore be cautious about applying the *Mitchell* rationale to these facts. Nor have the parties fully briefed the issues. I thus would not hold standing terminated upon the adoption.

In sum, I would remand. I therefore dissent.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED AND FILED JANUARY 3, 1996

SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

NO. 93-3-00650 7

In Re the Visitation of:

NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL,

Minors,

JENIFER TROXEL, and GARY TROXEL,
Paternal Grandparents,

Petitioners,

and

TOMMIE GRANVILLE, Mother,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(VISITATION)
(FNFCL)

I. HEARING/TRIAL

1.1 A trial was held on December 14, 1994 and December 19th, 1994.

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1.2 The findings are based on trial.

1.3 The following people attended: Petitioners and attorney MARY H. MCINTOSH, Respondent and their attorney DONALD BISAGNA; also, lay witnesses and expert witnesses, Tamar Groffman, a therapist, and Nora Young, PhD, psychologist.

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

2.1 The petitioner is seeking visitation rights with the following children:

NATALIE ANNE TROXEL, DOB: 11/1/89
ISABELLE ROSE TROXEL, DOB: 12/24/91

2.2 BASIS OF JURISDICTION.

This state is the home state of the children because the children lived in Washington with a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

2.3 BEST INTEREST OF THE CHILDREN.

The following facts are deemed in the best interest of the children:

2.3A. The children are the children of Respondent and the Petitioner's deceased son, Brad Troxel.

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2.3B. Brad Troxel died in May of 1993.

2.3C. The Petitioners brought this action in order to be awarded certain and specific visitation rights with the children.

2.3D. The Petitioners are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.

2.3E. The court considered the best interests of the children as mandated by RCW 26.09/160 (3). The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' nuclear family. The court finds that the childrens' best interests are served by spending time with their mother and stepfather's other six children.

2.3F The experts did not have an opportunity to interview all parties. They neither interviewed the Troxels nor observed them with their grandchildren.

2.3G Expert Young based her opinion, in part, upon erroneous factual information, specifically the fact that one of the children slept in the bedroom in which the Petitioners' son committed suicide.

2.3H The court viewed a videotape of the children and the Petitioners.

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2.3I Having this balance in mind, the court finds that the Petitioners should be awarded the following visitation:

1. One weekend per month, starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m., starting with the month of March, 1994.

2. One Sunday in January and one Sunday in February, starting at 10:00 a.m. and ending at 6:00 p.m.

JUDGE MICHAEL RICKERT

Presented by:

s/ Mary H. McIntosh
MARY H. McINTOSH #12744
Attorney for Petitioners

APPENDIX D — VISITATION DECREE OF THE SUPERIOR COURT OF WASHINGTON FOR SKAGIT COUNTY DATED MAY 8, 1995

SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

No. 93-3-00650 7

In Re the Visitation of:

NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL,

Minors,

JENIFER TROXEL, and GARY TROXEL,
Paternal Grandparents,

Petitioners,

and

TOMMIE GRANVILLE, Mother,

Respondent.

VISITATION DECREE (DC)

I. JUDGMENT SUMMARY

Does not apply.

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II. BASIS

The findings of fact and conclusions of law have been entered in this case.

III. DECREE

IT IS DECREED that:

3.1 DISPOSITION.

The petition is granted. The petitioner shall have visitation rights as set forth in paragraph 3.2.

3.2 VISITATION.

Visitation is ordered as follows:

1. One weekend per month, starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m., starting with the month of March, 1995.

2. One Sunday in January and one Sunday in February, starting at 10:00 a.m. and ending at 6:00 p.m.

3. One week in the summer, from Sunday to Sunday, which week will include the weekend above described from that month. The visitation will commence at 10:00 a.m. on the first Sunday and terminate at 6:00 p.m. on the last Sunday. The Petitioners will give thirty (30) days notice of the

week that they desire for that visitation. For purposes of this provision, the summer is defined as being from June 15th through September 1st. The Grandparents shall seek the approval of the Mother should they wish to take the children out of the county for an extended visitation. Should the Mother withhold agreement, the parties shall mediate the dispute at Common Ground, Mount Vernon, Washington. If grandparents go out of Skagit County, they shall inform the mother where they are going.

4. Four hours on each of the Petitioners' birthdays, at the Petitioners discretion, not to interfere with the childrens' school hours.

OTHER:

1. Respondent shall keep the Petitioners apprised of school and extracurricular events, such as school plays, open houses, sports events, performances and recitals, and the like.

2. All parties shall assure that the child, Isabelle, is called Isabelle, rather than her middle name "Rose".

3. The parties shall confer with regard to answering all questions as to the death of Brad Troxel. The Petitioners shall change the subject until a unified approach can be reached as to the answers to give the children.

4. Petitioners or either of them shall provide their portion of the transportation for the children, unless there is an emergency, then the Troxel adult children, (defined as the sons, the daughter and the daughters and sons in law) can provide the transportation.

5. The weekend visitation shall be held on the second weekend of each month, which is defined as the second time during the month that there is a Saturday or a Sunday.

6. Both parties may change any scheduled visitation, with ten days written notice. Should the Respondent/ Mother be changing a scheduled visitation, the Petitioners shall have the first choice of a make-up time and vice-versa, PROVIDED THAT the make-up weekend shall be the weekend before or the weekend after the scheduled visitation, *if at all possible* in order to meet the goals of this court order.

7. The Sunday visitation for the months of January and February of 1995 shall continue as under the prior order, i.e., the first weekend of each month.

8. The parties shall not disparage the other party in front of the children.

Responsibility for transportation shall be as follows: The Respondent or anyone at her designation, shall deliver the children at the commencement of the visitation and the Petitioners shall deliver the children at the termination of the visitation, subject to the terms above stated.

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DATED this 8 of May 1995.

s/ Michael Rickert
JUDGE MICHAEL RICKERT

Presented by:

s/ Mary H. McIntosh
MARY H. McINTOSH #12744
Attorney for Petitioners

APPENDIX E — ORDER OF THE SUPREME COURT OF WASHINGTON DENYING MOTION FOR RECONSIDERATION DATED AND FILED APRIL 6, 1999

THE SUPREME COURT OF WASHINGTON

NO. 65605-3
(cons. with 65699-1 & 66207-0)

In re the Custody of SARA SKYANNE SMITH.

EDISON SMITH, et al.,

Respondents,

v.

KELLY STILWELL-SMITH,

Appellant.

In re Visitation Rights with JUSTIN ROSS WOLCOTT.

DAVID L. CLAY,

Petitioner,

v.

LISA WOLCOTT,

Respondent.

Appendix E

In re the Visitation of NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL.

JENIFER TROXEL, et ux.,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Motion for Reconsideration by Respondent/Smith, Petitioner/Clay and Petitioners/Troxel; the Motion for Reconsideration filed by Jennifer and Gary Troxel and the Motion to Strike Portion of Answer to Motion for Reconsideration.

Now, therefore, it is hereby

ORDERED:

That the Petitioner's Motion to Strike Portion of Answer to Motion for Reconsideration is granted. The answer filed on February 19, 1999, should be corrected on page 7 - 8 specifically the phrase "The Wynns have never prohibited the Troxels from seeing their children. Indeed, the weekend before their motion for reconsideration disingenuously made

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the claim that 'important relationships' will be destroyed by the Court's decision, the Troxels visited the Wynne children." Counsel should file a corrected page seven and eight and the original will be corrected that is on file. Corrected pages should be filed within seven days from the date of this order. The motions for reconsideration are both denied.

DATED at Olympia, Washington this 6th day of April, 1999.

s/ [illegible]
CHIEF JUSTICE